No. 83-773-CSY
Status: GRANTED

Title: Oregon, Petitioner
v.
Michael James Elstad

Docketed:
November 7, 1983

Court: Court of Appeals of Oregon

Counsel for petitioner: Mountain Jr., James E.

Counsel for respondent: Babcock, Gary D.

Entry	Date	Note	Proceedings and Orders
1	Nov 7 1983	G	Petition for writ of certiorari filed.
2	Dec 14 1983		DISTRIBUTED. January 6, 1984
3	Dec 23 1983	F	Response requested.
4	Jan 23 1984	G	Motion of respondent for leave to proceed in forma pauperis filed.
5	Jan 23 1984		Brief of respondent Michael J. Elstac in opposition filed.
6	Jan 25 1984		REDISTRIBUTED. February 17, 1984
8	Feb 27 1984		REDISTRIBUTED. March 2, 1984
9	Mar 5 1984		Motion of respondent for leave to proceed in forma pauperis GRANTED. Justice Marshall OUT.
10	Mar 5 1984		Petition GRANTED. Justice Marshall OUT.
			**********
12	Apr 9 1984		Order extending time to file brief of petitioner on the merits until May 19, 1984.
13	Apr 16 1984		Joint appendix filed.
14	May 19 1984		Brief of petitioner Oregon filed.
15	May 19 1984		Brief amicus curiae of Americans for Effective Law Enforcement, et al. filed.
16	Jun 1 1984		Brief amicus curiae of United States filed.
17	Jun 18 1984		Brief of respondent Michael J. Elstac filed.
18	Jul 16 1984		Record filed.
19	Aug 3 1984		CIRCULATED.
20	Aug 10 1984		SET FOR ARGUMENT. Wednesday, October 3, 1984. (3rd case)
21	Oct 3 1984		ARGUED.
22	Oct 3 1984		ARGUED.

IPP

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ALEXANDER L. STEVAS,
CLERK

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OREGON,

Petitioner,

v.

MICHAEL JAMES ELSTAD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

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QUESTION PRESENTED

Does the Self-Incrimination Clause of the Fifth Amendment require the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier admission from the defendant without advising him of his rights, even though the trial court found that the earlier admission was otherwise voluntary, and that it did not "taint" the subsequent confession?

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PETITION FOR WRIT OF CERTIORARI

The State of Oregon respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion entered by the Oregon Court of Appeals in *State of Oregon v. Michael James Elstad*, No. A24659 (February 16, 1983).

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing defendant Elstad's burglary conviction (Appendix A, below) is reported at 61 Or. App. 673, 658 P.2d 552 (1983). The order of the Supreme Court of the State of Oregon denying the State's petition for discretionary review of the decision of the Court of Appeals (Appendix B, below) is reported at 295 Or. 617, ___ P.2d ___ (1983).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The opinion of the Oregon Court of Appeals was entered on February 16, 1983. The Supreme Court of Oregon denied a timely petition for discretionary review on September 7, 1983. This petition for writ of certiorari was filed within the 60-day period prescribed by Rule 20, as time is computed under Rules 28 and 29.

CONSTITUTIONAL PROVISIONS INVOLVED

The resolution of the question presented in this

case involves the Self-Incrimination Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

United States Constitution, Amendment V provides in pertinent part:

> "No person shall * * * be compelled in any criminal case to be a witness against himself * * *."

United States Constitution, Amendment XIV provides in pertinent part:

> "Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT OF THE CASE

A. Summary of Facts

On the afternoon of December 17, 1981, police officers Burke and McAllister went to the residence of defendant Elstad's parents with a warrant for defendant's arrest. Defendant's mother permitted them in and showed them to defendant's bedroom where defendant was lying on his bed, partially dressed, listening to the stereo. (Tr. 63-64, 74). At the officers' request, he dressed and went into the living room. Officer McAllister stepped into the nearby kitchen with defendant's mother to explain the situation, while Officer Burke stayed in the living room with defendant. (Tr. 64, 74).

Both officers considered defendant to be under arrest at this point, although defendant was not told he was under arrest. (Tr. 74, 82). Officer Burke stayed with defendant in the living room, and defendant sat down on the sofa. (Tr. 74-75, 82). Burke sat down with defendant and asked him if he knew why the officers were there. Defendant said he did not. The officer inquired whether defendant knew Mr. Gross or the Gross family. Defendant said he did. Defendant also said that he had heard there had been a robbery at the Gross house. Burke replied that he thought defendant was involved in the burglary, and asked defendant what he knew about it. Defendant responded, "I was there." (Tr. 83-84). Burke did not ask any further questions of defendant at that time, nor did he otherwise attempt to clarify the nature or extent of defendant's participation in the crime, if any.

Defendant was placed in the patrol car, and one of the officers explained bail procedures to defendant's mother. Defendant's father arrived home at that time. After talking to police, he became agitated with his son, went to the patrol car, and began to reprimand defendant. Officer Burke intervened and had defendant's father move away from the car. (Tr. 75-76).

The officers did not question defendant about the burglary during the ride to the police station. (Tr.

78). They were required to respond to a possible crime, and a third officer who met them at the scene transported defendant to the police station. (Tr. 87). The two arresting officers joined defendant at the police station approximately 45 to 60 minutes later, and they and defendant then went to Officer McAllister's office. (Tr. 66, 87). McAllister advised defendant of his rights by reading from a standard *Miranda* rights card. (Tr. 66; Ex. 6). McAllister asked defendant if he understood the rights, and defendant answered affirmatively. (Tr. 76). It appeared to Officer McAllister that defendant in fact understood his rights. (Tr. 67). Both McAllister and defendant signed the *Miranda* rights card. (Tr. 66).

Defendant indicated he was willing to talk to the officers, and he gave a statement describing what occurred on December 11, the date of the burglary. Officer McAllister typed the statement as defendant gave it orally. The statement was taken at 4:45 p.m. (Tr. 66, 77). After McAllister typed the statement, defendant reviewed it. McAllister also read it back to defendant. (Tr. 69). Inaccuracies, such as typographical errors and misspellings, were corrected and initialed by defendant, and defendant signed the two-page statement. (Tr. 70, 77). In it, defendant told who was involved in the burglary, what information he gave others about the premises, what he

was paid for information about the residence and who paid him, and the extent of his involvement in aiding the entry. (Ex. 5). No threats or promises were made to defendant either at defendant's residence or at the police station when defendant gave his statement. (Tr. 68, 69, 78).

B. Procedural History: Raising and Preserving of the Federal Question

At trial, defendant moved to suppress his oral and written statements to police, on both state and federal constitutional grounds. In his written motion, he asserted that his oral statements, made before *Miranda* warnings, violated the Fifth and Sixth Amendments of the United States Constitution as interpreted by the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966). Although Oregon courts have never fashioned a warning requirement from the parallel self-incrimination provision of the Oregon Constitution, defendant nevertheless urged that that failure of police to advise him of his *Miranda* rights also violated the Oregon Constitution. Defendant next urged that his written confession should be suppressed as a "fruit of the poisonous tree." Defendant relied on *Wong Sun v. United States*, 371 U.S. 471 (1963), an inapplicable Oregon statute (Or. Rev. Statutes 133.683 applying to searches and seizures) and an Oregon Court of Appeals case, *State v. Lloyd*,

22 Or. App. 254, 538 P.2d 1278 (1975), decided on federal grounds.

The state did not introduce or otherwise seek to use defendant's initial oral statement, made prior to the *Miranda* warnings. (Tr. 92). The trial court considered the question of the admissibility of the pre-*Miranda* statement only in order to determine the nature of the illegality, if any, that arguably tainted the subsequent written confession (Exhibit #5). In denying defendant's motion to suppress, the trial court made the following findings and conclusions:

> "THE COURT: I'm going to deny the motion to suppress Exhibit #5 for these reasons: I'm of the view that the statements made by the defendant at the house in response to the officer's question: 'What do you know about the robbery?' must be suppressed. It would not be admissible because this man was not advised of his Miranda warnings, his Constitutional rights.
>
> "However, the statement taken at the jail would be admissible because the evidence shows that there was no taint between the first statement 'I was there' and the second. I have not seen the contents of the second statement, but assuming that there is incrimination [sic] evidence, statements in that written document, that would be admissible.
>
> "There was a break in the events from 45 to 50 minutes away from the courthouse and being transported by the police officer, and I think the taint — there's no showing of any taint whatsoever.
>
> "There is a showing by the State that the statements were made freely and voluntarily.

> The rights card is in evidence. The officer read the rights to him. They are numbered one through seven. They appear on Exhibit #6, and on the reverse side is the question: 'Do you understand these rights?' And the word y-e-h appears after that, which I assume is yes. 'Do you have any questions about your rights?' Answer: 'No.' 'Having these rights in mind, do you wish to talk to us now?' And it says, 'Y-e-h, I do.'
>
> "And I find that the State has established that the statement was given freely and voluntarily and knowingly and will not suppress Exhibit #5." (Tr. 91-92)

Thus, the trial court found defendant's initial statements unlawful only on the basis of *Miranda v. Arizona*, *supra*, and federal Fifth Amendment grounds. The trial court concluded, however, that this illegality did not taint the subsequent confession.

In challenging the trial court's ruling on appeal in the Oregon Court of Appeals, defendant relied only on federal cases and state cases applying federal law. Defendant argued that his initial statement was unlawfully elicited under *Miranda v. Arizona, supra* and state cases decided thereunder. Relying on *Wong Sun v. United States, supra, United States v. Bayer*, 331 U.S. 532 (1947), and state cases applying the federal "fruit of the poisonous tree" doctrine, defendant urged that his written confession was a product of his first, unlawfully obtained statement, and that therefore it must be suppressed.

The court of appeals held that the trial court erred in refusing to suppress defendant's written confession. The court concluded, as a matter of law, that the police action in obtaining an admission from defendant in violation of *Miranda* exerted a coercive impact on defendant's later confession, despite the fact that the subsequent confession was preceded by *Miranda* advice and a waiver of rights.[1] 61 Or. App. 673, 678, 658 P.2d 552, 555.

REASONS FOR GRANTING THE WRIT

The rule of federal constitutional law announced by the Oregon Court of Appeals is in direct conflict with that applied in the same circumstances by federal courts. The Oregon Court of Appeals' opinion marks a departure from reasoned analysis. It announces a rule which fails to effectuate the values protected by the Fifth Amendment and exacts a high price from legitimate law enforcement. For these reasons, review by this Court is warranted.

In this case, defendant, while at his parent's residence, made an initial admission to police in which he stated, "I was there," in response to a police officer's inquiry of what defendant knew about a particular burglary. Defendant did not

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[1]Even if there were some doubt whether the Oregon Court of Appeals decided the issue purely or primarily on federal constitutional grounds, and we submit there should be none, that doubt should be resolved in favor of this Court's jurisdiction. *Michigan v. Long*, ___ U.S. ___, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983).

claim, and the courts below did not hold, that the police conduct at the time he made the statement was actually coercive or that his statement was involuntary in fact. Rather, the statement was inadmissible exclusively because of the failure of police to give *Miranda* warnings to defendant before he made this limited admission.

The police thereafter transported defendant to the police station for booking and, prior to asking defendant any potentially incriminating questions, one of the arresting officers fully advised defendant of his *Miranda* rights. Defendant said that he understood those rights and that he was willing to waive them and give a statement. He signed a waiver card, and gave the police a two-page confession describing the extent of his involvement in the burglary.

The facts demonstrate unequivocally that when defendant gave his written confession to police, the illegality which infected his initial statement had been fully removed. The procedural failure to give the prophylactic *Miranda* advisal was the only circumstance which rendered the first statement inadmissible. That circumstance was not present when defendant gave the second, full-blown confession. Nevertheless, the Oregon Court of Appeals suppressed defendant's written confession. The court held that at the time defendant gave that confession

to police, the "cat was out of the bag." This fact, the Court of Appeals concluded, was sufficient, in and of itself, to "taint" the second statement and render it inadmissible.

The Court of Appeals' reasoning is flawed. Although the court was quick to seize upon the "cat out of the bag" language of *United States v. Bayer*, 331 U.S. 532 (1947), it was equally quick to forget what this Court said in *Bayer* on the issue of whether a subsequently obtained confession is inadmissible merely by virtue of the psychological consequence of a prior confession:

> "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as a fruit of the first. *But this court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one, after those conditions have been removed.*" *Id.* 331 U.S. at 540-541. (Emphasis added).

This Court thus refused in *Bayer* to adopt an inflexible rule that any initial inadmissible statement which "lets the cat out of the bag" and thereby places defendant at the disadvantage of having disclosed his "secret," automatically taints a later confession. Rather, a subsequent confession is admissible if it is made after the conditions which

precluded the use of the first statement have been removed.

The Court of Appeals subtly, yet significantly, misdirected the analysis in this case by shifting the focus from the effect of the prior illegality to the effect of the prior admission:

> "* * * [T]he coercive impact of the unconstitutionally obtained statement remains, because in a defendant's mind it has sealed his fate. It is this impact that must be dissipated in order to make the subsequent confession admissible. In determining whether it has been dissipated, lapse of time and change of place from the original surroundings are the most important considerations. * * *" 61 Or. App. at 677, 658 P.2d at 554. (Citations omitted).

This reasoning misses the point. The essential premise of the "cat out of the bag" doctrine is the recognition that a defendant is never free of the consequence of having made the initial statement. The psychological disadvantage that flows from the fact of a prior admission does not go away. The cat, to whatever extent it gets out of the bag, does not go back in. It is illogical to suggest that a lapse of time or change in circumstance lessens the psychological effect that follows when a suspect has let some or all of the "secret out." The suspect has made a statement to police, and he knows it. He is not going to forget what he said to the authorities merely because police move him to a new location for further questioning, because a different officer questions

him, or because additional questioning is delayed several hours or several days.

The Court of Appeals borrows the analysis which considers a change of place or lapse of time from cases involving initial statements made under circumstances that contained elements of actual duress or coercion. *See e.g., Westover v. United States*, 384 U.S. 436 (1966); *Clewis v. Texas*, 386 U.S. 707 (1967). In that context, lapse of time or change of circumstances logically should be considered, because such facts bear on whether the *conditions* which rendered the first statement inadmissible have been removed, not because the psychological *effect* of having made the prior statement is dissipated by those circumstances. It makes obvious sense to consider the passage of time, change of place, and so on in the context of an initial confession which is the product of an overborne will. There, the concern is with restoring the suspect's ability to choose voluntarily whether to talk. Removing the suspect from the conditions that impermissibly intimidate and pressure him to speak, and allowing time for him to rest, reflect, or reevaluate, serves to insulate the suspect psychologically from the coercive circumstances and thus to "break the stream of [illegal] events." *Cf. Clewis v. Texas, supra*, 386 U.S. at 710.

The illegal condition here was not actual duress. Rather, defendant's initial statement was held

inadmissible only because the police had failed to follow *Miranda* procedural safeguards. When, at the police station, the officer carefully advised defendant of his *Miranda* rights and ensured that he understood those rights before asking him if he would give a statement, defendant effectively was removed from the circumstances that rendered the prior statement inadmissible. A further change in the place of questioning, or longer delay before resumption of questioning, would have done nothing to dissipate the "taint" of the procedural failure to give the *Miranda* advice. To require police, under these circumstances, to postpone questioning or to resume the questioning through a different officer would serve no meaningful purpose. Ultimately, to impose such requirements could be counterproductive, because of the concern and confusion that might be felt by a suspect who is needlessly shuffled between officers and settings, and who is detained for questioning for a longer period of time than might otherwise be necessary.

Moreover, defendant's initial statement, "I was there," was not a confession, fully acknowledging his guilt of a burglary of which the police had not yet accused him. It was, at most, an admission which indeed tended to incriminate defendant, but only when coupled with other information with which the police had not yet confronted him. The psychological

impact of such an admission upon a subsequent confession is clearly less than that contemplated by *Bayer*'s "cat out of the bag" metaphor.

Several lower federal courts, confronted with substantially similar facts, have concluded that the giving of *Miranda* warnings is sufficient to remove the "taint" of the unlawfulness attached to a prior confession, where there was no police coercion involved in eliciting the prior confession and the only "illegality" was the procedural failure to give warnings. *See e.g., Knott v. Howard*, 511 F.2d 1060, 1061 (1st Cir. 1975); *United States v. Knight*, 395 F.2d 971, 973 (2nd Cir. 1968); *United States v. Toral*, 536 F.2d 893, 897 (9th Cir. 1976). The following portion of the decision of the United States Court of Appeals for the Ninth Circuit in *United States v. Toral, supra*, is particularly instructive:

> "* * * [T]he proper inquiry is whether the conditions that rendered the pre-warning admissions inadmissible carried over to invalidate appellant's subsequent confession. * * * In the present case appellant's initial statements were rendered involuntary almost exclusively because of the failure of police to give him the *Miranda* warnings. There was very little that was inherently coercive about the circumstances leading up to the admissions by appellant either before or after the warnings were given. All of the questioning took place in the security of appellant's own home, * * * and the initial questioning, though improper, was in the form of preliminary questions that may have been asked of anyone in order to narrow the field of suspects. Unlike [the cases cited by appellant], the record before us

> reveals no coercive atmosphere that was carried over after the *Miranda* warnings were given.
>
> We do not suggest that the impact of the confession itself should be minimized. Under other circumstances, a prior *involuntary* confession standing alone may be enough to render involuntary a confession made after the *Miranda* warnings are given. In the circumstances of the present case, however, we cannot say that the impact of the prior statements was so great as to render appellant's confession involuntary." 536 F.2d at 896-897. (Citations omitted; emphasis added).

Although the Oregon Court of Appeals was urged to follow the Ninth Circuit's analysis, the Oregon appellate court refused to distinguish between the "taint" which attaches to a coerced confession, and that which attaches to a statement elicited unlawfully under the *Miranda* rule. The court likewise refused to distinguish between incriminating admissions and full-blown confessions in evaluating the extent of the "taint" which such statements may have upon subsequent confessions. The Oregon court rejected these arguments and said that to draw such distinctions "denigrates" the importance of the *Miranda* decision and the evil it was designed to prevent. 61 Or. App. at 677, 658 P.2d at 554. The issue in this case, however, is the admissibility of the second confession, not the admissibility of defendant's pre-warning admission. The *Miranda* decision's concern is with the potential for coercion inherent in custody, and it expressly prescribed the

now familiar set of warnings as a satisfactory means to attenuate that evil. To refuse, as the Oregon appellate court refuses, meaningfully to consider the giving of *Miranda* warnings in assessing whether defendant's second confession was admissible is to denigrate the importance of those warnings and to reduce them to a hollow procedural ritual.

This Court has recognized that there is a significant difference between police conduct which directly infringes upon the right against compulsory self-incrimination and conduct which violates only the prophylactic rules developed to protect that right. *See Michigan v. Tucker*, 417 U.S. 433, 439, 444 (1974). Thus, although this Court has not squarely addressed the issue presented in this case, the suggestion has been made that where the prior illegality does not implicate Fourth Amendment concerns or directly infringe on the right against compulsory self-incrimination, the giving of proper *Miranda* warnings may be adequate to insulate a subsequent confession for Fifth Amendment purposes. *See Michigan v. Tucker*, *supra*, 417 U.S. at 448-450; *Brown v. Illinois*, 422 U.S. 590, 601-603 (1975); *Dunaway v. New York*, 442 U.S. 200, 216-217 (1979). The Oregon Court of Appeals lost sight of its constitutional objective in this case. It forgot that "[c]ases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion,

since that clause provides only that a person shall not be *compelled* to give evidence against himself." *Michigan v. Tucker*, *supra*, 417 U.S. at 448, (emphasis original). The result of the Oregon court's misanalysis is a rule of exclusion that extends far beyond the *Miranda* decision and its rationale.

The concurring judge in this case wrote separately to observe:

> "I regret the introduction of the metaphor of an escaping feline ("the cat out of the bag") into our legal lexicon. I recognize that it is a piece of literary cleverness from relatively ancient judicial roots (*United States v. Bayer*, 331 US 532, 540, 67 S Ct 1394, 91 L Ed 1564 (1947)), but mere age does not make it worthy. The fact is that we have used the metaphor as a short-hand description of a particular psychological phenomenon—a prisoner's lowered resistance to confessing a second time, once a first confession has been given—to the extent that we now seem to think that this phenomenon must occur in every case. The metaphor now rules where analysis was once sovereign. However, the overthrow occurred too long ago for a dissent to serve any purpose now, so I concur." 61 Or. App. at 678, 658 P.2d at 555.

The concurrence is only half correct. True, the metaphor now rules where analysis was once sovereign, but that is not a consequence of Justice Jackson's opinion in *United States v. Bayer*, *supra*. The overthrow of analysis has been accomplished by the Oregon court. Human conduct is fueled by a vast range of motivations, and a defendant's confession may stem as much or more from remorse, a hope for

lenient treatment, a need to appease a parent or other family member, or some other concern. In most cases, as in this case, defendants do not take the stand to explain their motivations. Although the fact of a prior admission may have the psychological effect of lowering a suspect's resistence to remain silent, the *Bayer* opinion expressly disavowed that this alone should render unlawful a subsequent confession. Yet this psychological assumption alone results in the suppression of defendant's written confession in this case. The effect of the Oregon rule, as the concurring judge observes (61 Or. App. at 679, 658 P.2d at 555), is that a suspect who responds to pre-advisal questioning is thereby forever immunized from later effectively waiving his right to remain silent. Any subsequent statement is *per se* tainted and inadmissible. There is no constitutional justification for imposing this high cost on the legitimate activities of law enforcement.

CONCLUSION

The decision of the Oregon appellate court is a clear departure from the analytic principles announced by this Court, and the result is plainly wrong. This decision directly conflicts with the rule followed by the lower federal courts, including those in the Ninth Circuit within which Oregon lies. Law enforcement officers in Oregon therefore are held to two conflicting standards in attempting to comply

with the Fifth Amendment, and Oregon citizens receive different protection from a single principle of federal constitutional law, depending on whether they find themselves in federal or state court. That result is neither rational nor fair. The Court should take this occasion to clarify the place of the "cat out of the bag" reasoning in the context of the taint that attaches to an admission which violates only the procedural rules of *Miranda*.

Respectfully submitted,

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Appendix A

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Respondent,
v.
MICHAEL JAMES ELSTAD,
Appellant.
(29500; CA A24659)

Appeal from Circuit Court, Polk County.

Darrell J. Williams, Judge.

Argued and submitted October 13, 1982.

Stephen J. Williams, Deputy Public Defender, Salem, argued the cause for appellant. With him on the brief was Gary D. Babcock, Public Defender, Salem.

Virginia L. Linder, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and William F. Gary, Solicitor General, Salem.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

WARDEN, J.

Reversed and remanded for new trial.

Gillette, P. J., concurring.

WARDEN, J.

Defendant appeals his conviction for burglary in the first degree. He assigns as error the trial court's denial of his motion to suppress a written confession, claiming that a prior, unconstitutionally obtained confession "let the cat out of the bag," *United States v. Bayer,* 331 US 532, 540, 67 S Ct 1394, 91 L Ed 1654 (1947), and tainted the subsequent confession, under the "fruit of the poisonous tree" doctrine of *Wong Sun v. United States,* 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963). We reverse.

On December 17, 1981, officers McAllister and Burke went to defendant's home with a warrant for his arrest. His mother admitted the officers and directed them to defendant's bedroom. Both officers stayed in the bedroom while defendant dressed. He was not told that he was under arrest. Burke then took him to the living room, while McAllister went into the kitchen with defendant's mother. Burke testified:

> "I sat down with [the defendant] and I asked him if he was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did, and also added that he heard that there was a robbery at the Gross house. And at that point I told [the defendant] that I felt he was involved in that, and he looked at me and stated, 'Yes, I was there.'"[1]

After this conversation, defendant was placed in the officers' patrol car for transportation to the Polk County jail. On their way, the officers responded to a report of a robbery, and defendant was transported to the jail in another police car. Forty-five minutes to an hour elapsed before McAllister and Burke arrived at the jail. Defendant was then informed for the first time of his rights under *Miranda v. Arizona,* 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966). He gave an oral confession; it was typewritten by McAllister as it was spoken. He then signed the two-page confession which is the subject of his motion to suppress. Burke, McAllister and defendant were the only persons present when the confession was given.

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[1] On cross-examination, Burke testified, "And I asked what he knew about the burglary, and he said, 'I was there.'"

The state does not dispute that the statement elicited from defendant at his home was inadmissible. Our inquiry here is whether there was a sufficient break in the stream of events between that inadmissible statement and the written confession to insulate the latter statement from the effect of what went before. *Clewis v. Texas,* 386 US 707, 87 S Ct 1338, 18 L Ed 2d 423 (1967); *State v. Mendacino,* 288 Or 231, 603 P2d 1376 (1979).

In *State v. Hibdon,* 57 Or App 509, 645 P2d 580 (1982), police also were in possession of an arrest warrant when they went to the defendant's girlfriend's house to arrest him. Suspecting that the defendant was hiding in the bedroom, an officer entered the room and flushed him from beneath the bed by pointing a gun at the bed and ordering him to come out. The defendant gave inculpatory responses to a question asked by the officer. He was then placed in a patrol car, read his *Miranda* rights and transported to the police station, where, after being advised of his *Miranda* rights a second time, he confessed. The full confession was made less than one hour after the prior statement. We stated:

> "The taint of the police misconduct in questioning defendant before administering the *Miranda* warnings was not removed by the brief span of time and the change of his location from [defendant's girlfriend's] apartment to the police station, notwithstanding the fact that he had received *Miranda* warnings in the meantime." 57 Or App at 512.

We held that the confession should have been suppressed.

The state here attempts to distinguish *Hibdon* in two ways. First, it describes the circumstances leading up to the initial confession in *Hibdon* as involving "significant elements of threat and compulsion" in that the officer pointed his gun at the defendant and told him to "come out or be shot," whereas this case involves no such threat or compulsion but 'just a procedural failure to give *Miranda* warnings." The state argues that the absence of actual compulsion should be a factor in determining if there was a sufficient break in the stream of events to insulate a defendant psychologically from the effect of the coercive circumstances. The state's argument derives some support

from *State v. Mendacino, supra*. There, the initial confession was inadmissible because the interrogating officers persisted in questioning the defendant after he indicated that he did not want to talk and wanted a lawyer, circumstances that, the court noted, made the initial confession "partake more of actual coercion." 288 Or at 238.

Conceding that the flagrancy of police misconduct is a factor in another "fruit of the poisonous tree" context[2] and that it may be a factor in the analysis of the "total circumstances of each case" that we must make in these successive interrogation cases, *State v. Mendacino, supra*, 288 Or at 238, we disagree that it is a factor of sufficient significance to distinguish this case from *Hibdon*. The state's analysis denigrates the importance of *Miranda v. Arizona, supra*, in which the court held that the warnings were mandatory in order to protect Fifth Amendment rights against "the compulsion inherent in custodial surroundings." 384 US at 458. Regardless of the absence of actual compulsion, the coercive impact of the unconstitutionally obtained statement remains, because in a defendant's mind it has sealed his fate. It is this impact that must be dissipated in order to make a subsequent confession admissible. In determining whether it has been dissipated, lapse of time and change of place from the original surroundings are the most important considerations. *See Westover v. United States*, 384 US 436, 496, 86 S Ct 1602, 16 L Ed 2d 694 (1966).

In *State v. Mendacino, supra*, the court stated that an interval of seventy-two hours might be adequate insulation, but was not in that case, given other factors, including that the defendant remained in custody without an opportunity to consult an attorney and that the same two officers who had elicited the original confessions were present at the subsequent interrogation. Both of those considerations are present in this case. For these reasons, we do not find the absence of actual threats and compulsion sufficient to distinguish this case from *Hibdon*.

The state also argues that the nature of the disclosure in the initial statement distinguishes this case from

[2] In determining whether a confession is the fruit of a prior illegal *arrest*, the flagrancy of the police misconduct in making the arrest is a factor to be considered. *Brown v. Illinois*, 422 US 590, 603-604, 95 S Ct 2254, 45 L Ed 2d 416 (1975).

Hibdon. Here, the state suggests, the cat was only "peeking" out of the bag, *State v. Foster*, 40 Or App 635, 640, 596 P2d 572 (1979), *rev'd* 288 Or 649, 607 P2d 173 (1980), whereas in *Hibdon* the defendant in his initial statement admitted to theft by possession of stolen property, if not to the burglary for which he was being arrested. Here, when the officer inquired about a burglary at a certain house, defendant merely stated, "I was there." That statement may not literally have admitted complicity in the burglary, but given the manner in which the questioning officer put the inquiry, indicating that he felt defendant was "involved" in the burglary, defendant's affirmative response was significantly inculpatory. The cat was sufficiently out of the bag to exert a coercive impact on defendant's later admissions. It was error not to suppress the typewritten confession.[3]

Reversed and remanded for new trial.

GILLETTE, P. J., concurring.

I join in the opinion of the court, which I believe is compelled by *State v. Wolfe*, 61 Or App 409, ___ P2d ___ (1983) and *State v. Mendacino*, 288 Or 231, 603 P2d 1376 (1979). I write separately to add two observations.

1. I regret the introduction of the metaphor of an escaping feline ("the cat is out of the bag") into our legal lexicon. I recognize that it is a piece of literary cleverness from relatively ancient judicial roots (*United States v. Bayer*, 331 US 532, 540, 67 S Ct 1394, 91 L Ed 1654 (1947)), but mere age does not make it worthy. The fact is that we have used the metaphor as a short-hand description of a particular psychological phenomenon—a prisoner's lowered resistance to confessing a second time, once a first confession has been given—to the extent that we now seem to think that this phenomenon must occur in every case. The metaphor now rules where analysis was once sovereign. However, the overthrow occurred too long ago for a dissent to serve any purpose now, so I concur.

[3] Defendant also assigns error to the denial of his motion to strike certain evidence as uncorroborated testimony of an accomplice. Uncorroborated accomplice testimony is not inadmissible. It is only insufficient by itself to support a conviction. ORS 136.440(1). The trial court therefore correctly denied defendant's motion to strike. Defendant does not assign as error the trial court's denial of his motion for a judgment of acquittal.

2. Law enforcement authorities should take a hint: delaying service of a warrant in order to get a defendant to confess may seem cute or even useful, but it is counter-productive. The present state of the law seems to be that a defendant in such a case is best served if he responds to prearrest questioning, because doing so immunizes him from later effectively waiving his *Miranda* rights. A number of confessions are going to be lost from the bag, right along with the cat, unless this police practice is changed.

Appendix B

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,	)	
	)	
Plaintiff-Respondent,	)	ORDER
	)	
v.	)	CA A24659
	)	SC 29521
MICHAEL JAMES ELSTAD,	)	
	)	
Defendant-Appellant.	)	

This matter is before the court upon Respondent's petition for review of the decision of the Court of Appeals in the above-entitled cause.

IT IS HEREBY ORDERED that the petition for review is denied.

DATE: September 7, 1983.

[Signature omitted in printing.]

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-773

STATE OF OREGON, Petitioner

vs.

MICHAEL JAMES ELSTAD, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Michael James Elstad, now residing in Silverton, Oregon, asks leave to file the attached brief in opposition to the Petition for Writ of Certiorari filed by the State of Oregon on November 7, 1983, to review the judgment and opinion of the Court of Appeals of the State of Oregon entered in this proceeding on February 16, 1983, without prepayment of costs and to proceed in forma pauperis. The respondent's affidavit in support of this brief in opposition is attached hereto.

GARY D. BABCOCK
Public Defender for Oregon
STEPHEN J. WILLIAMS
Deputy Public Defender for Oregon
Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-773

STATE OF OREGON, Petitioner

v.

MICHAEL JAMES ELSTAD, Respondent

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Michael James Elstad, being first duly sworn according to law, depose and say, in support of my application for leave to proceed without being required to repay the costs or fees:

1. I am respondent in the above entitled case.

2. Because of my poverty I am unable to pay the costs of said cause, and still provide myself with the necessities of life.

3. I am unable to give security for the same, and still provide myself with the necessities of life.

4. I believe I am entitled to the redress I seek in said cause.

5. I am unable to obtain from the court below a certified copy of the record without payment of fees and costs.

6. I was charged in Polk County, Oregon with burglary in the first degree, ORS 164.225. I was tried and convicted of the charge in a trial before the court. The Polk County Circuit Court imposed a five year sentence and ordered that I pay $18,000 restitution. I appealed this conviction to the Court of Appeals of the State of Oregon, which reversed and remanded for a new trial. 61 Or App 673, 658 P2d 552 (1982). The Supreme Court of the State of Oregon denied the state's petition for review, 295 Or 617, 670 P2d 1033 (1983).

This brief in opposition is filed for the purpose of urging this Court to deny the Petition for Writ of Certiorari sought by the State of Oregon.

Michael Elstad
MICHAEL JAMES ELSTAD, Respondent

Subscribed and sworn to before me this 12th day of January, 1984.

Tracy Louise Knopp
NOTARY PUBLIC FOR OREGON
My Commission Expires: 1-8-88

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-773

STATE OF OREGON, Petitioner

vs.

MICHAEL JAMES ELSTAD, Respondent

On Petition for a Writ of Certiorari to
the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Was defendant's jailhouse confession tainted by an earlier admission he made to arresting officers when he was arrested pursuant to a warrant and interrogated without the benefit of Miranda warnings, where the jailhouse confession was made to the arresting officers not more than one hour after defendant's arrest but after Miranda warnings at the jail?

OPINIONS BELOW
JURISDICTION
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

Petitioner's statements of these matters are accepted.

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT PRESENT A SIGNIFICANT FEDERAL QUESTION. THE DECISION OF THE OREGON COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S DECISIONS CONCERNING THE ADMISSIBILITY OF CONFESSIONS MADE AFTER INADMISSIBLE CONFESSIONS.

The decision of the Oregon Court of Appeals in this case is consistent with prior decisions of this Court. See: United States v. Bayer, 331 US 532, 67 S Ct 1394, 91 L Ed 1654 (1947); Westover v. United States, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966); Clewis v. Texas, 386 US 77, 87 S Ct 1338, 18 L Ed 2d 423 (1967).

In addition, both the Oregon Supreme Court and the Court of Appeals have consistently and correctly applied the federal standard in this area. See: State v. Foster,

288 Or 649, 607 P2d 173 (1980); State v. Mendacino, 288 Or 231, 603 P2d 1376 (1979); State v. Hibdon, 57 Or App 509, 645 P2d 580 (1982); State v. Pelletier, 43 Or App 677, 603 P2d 1247 (1979); State v. Paz, 31 Or App 851, 572 P2d 1036, rev den (1977); State v. Garrison, 16 Or App 588, 519 P2d 1295, rev den (1974).

Defendant was initially interrogated by Deputy Burke after defendant was arrested at his house, but before he was given Miranda warnings. Warnings were required before any interrogation because defendant was in custody.

Defendant's written confession was inadmissible because it was tainted by his prior statement, which he made in response to Deputy Burke's questioning at defendant's house.

Officer Burke asked defendant what he knew about the burglary. Defendant responded, "I was there." (Tr 74-75, 84). Defendant was transported to the Polk County Jail, where he finally received Miranda warnings, 45-60 minutes after his arrest. Defendant was interrogated by the arresting officers at the jail. He signed a constitutional rights waiver card and confessed.

The leading Oregon case on the admissibility of a confession made after an inadmissible confession is State v. Mendacino, 288 Or 231, 603 P2d 1376 (1979), which was relied upon by the Oregon Court of Appeals in this case. In State v. Mendacino, supra, 288 Or at 237, the Oregon Supreme Court stated:

> "The effect of a later confession following an inadmissible confession was described by the United States Supreme Court in United States v. Bayer, 331 US 532, 540-541, 67 S Ct 1394, 91 L Ed 1654 (1947):

> "'Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under any circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.' (Emphasis added.)
>
> "The removal of the improper conditions generally involves a change in time and location sufficient to dissipate the pernicious effects of the unlawful conduct. We believe that the Supreme Court in Clewis v. Texas, 386 US 707, 710, 87 S Ct 1338, 18 L Ed 2d 423 (1967) stated the proper rule that the change, or the 'break in the stream of events,' should be sufficient to 'insulate the statement from the effect of all that went before.' Cf., Evans v. United States, 375 F2d 355 (8th Cir 1967)." (Footnote omitted.)

Defendant's written confession was made, at most, one hour after his initial admission to Officer Burke. The second confession was not sufficiently removed in time from the first admission.

Defendant was moved from his house to the jail. However, he remained in police custody. The same officers interrogated defendant at the jail. The change in location was not sufficient to remove the taint.

The confession was at least partially an expansion of defendant's prior statement admitting he was at the scene of the burglary. Defendant was undoubtedly influenced by the content of his prior admission. There was no break in the stream of events which dissipated the taint of defendant's first admission.

II.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH LOWER FEDERAL COURT DECISIONS

The state asserts that "[t]he rule of federal constitutional law announced by the Oregon Court of Appeals is in direct conflict with that applied in the same circumstances by federal courts" (Pet. p. 8). The state is wrong.

In support of its contention the state cites three cases: Knott v. Howard, 511 F2d 1060 (1st Cir 1975); United States v. Knight, 395 F2d 791 (2d Cir 1968); United States v. Toral, 536 F2d 893 (9th Cir 1976). The state does not discuss the facts of any of these cases and sets out only a brief excerpt from United States v. Toral. Each of these cases is distinguishable from the present case. None of these cases even remotely present the "same circumstances" as the arrest and interrogations of defendant in this case.

In Knott v. Howard, supra, the court held that Miranda v. Arizona was inapplicable. Furthermore, the defendant's second confession was not the product of police interrogation. 511 F2d at 1061.

In United States v. Knight, supra, the defendant was charged with interstate transportation of pornographic materials. State officers questioned the defendant in his home about where he obtained the materials, which the officers had seen while they were with defendant in his house for another reason. The defendant told the police he had obtained the materials in California. The defendant sought to suppress subsequent statements to federal agents after they gave him Miranda warnings. The opinion states:

> "* * * The major element of the crime --possession, which creates the presumption of intent to sell--was established by appellant's voluntary act of showing the films, the photographs in plain sight, and the lawful search of the premises incident to the arrest by city police. It is true that appellant had 'let the cat out of the bag,' see United States v. Bayer, 331 U.S. 532, 540, 67 S.Ct. 1394, 91 L.Ed. 1654 (1947), by telling the local officers that he had brought the pictures from California. However, no psychological disadvantage flowed from that because appellant apparently thought that the fact that he did not obtain the material in New York protected him. Moreover, that the admission was once made should not, in itself, always be fatal, see United States v. Bayer, supra; surely, federal authorities must sometimes be allowed to conduct reasonable investigations even when state authorities have failed properly to apprise suspects of their constitutional rights. * * *" 395 US at 975. (Emphasis added.)

In United States v. Toral, supra, federal agents went to defendant's home with a warrant to search it for drugs. The agents were admitted by the defendant's wife, and several persons were inside, some of whom were suspected of being involved in narcotics trafficking. An agent found a brown paper bag containing heroin in a bedroom. They asked the defendant who the bedroom and bag belonged to. The defendant said they were his. The defendant was arrested and given Miranda warnings. He then admitted he had received some heroin and was holding it because of the money involved. In affirming the defendant's conviction, the court stated:

> "In the present case appellant's initial statements were rendered involuntary almost exclusively because of the failure of the police to give him the Miranda warnings. There was very little that was inherently coercive about the circumstances leading up to the admissions made by appellant either before or after the warnings were given. All of the questioning took place in the security of appellant's own home, see Knight, supra, and the initial questioning, though

> improper, was in the form of preliminary questions that may have been asked of anyone in order to narrow the field of suspects. * * *" 536 F2d at 896.

In the instant case, Officers Burke and McAllister had obtained a warrant for defendant's arrest for the burglary before they went to his home. When Burke interrogated defendant in defendant's living room, Burke was not attempting to narrow the field of suspects. The police had already demonstrated to a magistrate that they had probable cause to arrest defendant for the burglary. Burke's questions were not preliminary. He confronted defendant with an allegation that defendant was involved in the burglary. The questions were calculated to obtain an admission of guilt from defendant.

The decision of the Oregon Court of Appeals is not inconsistent with any of the federal cases the state relies on. The state's argument that law enforcement officers in Oregon are held to two conflicting standards in attempting to comply with the Fifth Amendment is spurious.

CONCLUSION

The decision of the Oregon Court of Appeals was correct. The petition for writ of certiorari should be denied.

GARY D. BABCOCK
Public Defender for Oregon
STEPHEN J. WILLIAMS
Deputy Public Defender for Oregon
Counsel for Respondent

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

(2)

No. 83-773

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OREGON,

Petitioner,

v.

MICHAEL JAMES ELSTAD,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

---

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOV. 7, 1983
CERTIORARI GRANTED MAR. 5, 1984

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Exhibit 5: Elstad's Statement, dated Dec. 17, 1981 40

Amended Trial Order, filed Mar. 23, 1982 43

Judgment, filed Apr. 14, 1982 47

The following opinions and orders have been omitted in printing this appendix, because they appear on the following pages of the printed petition for certiorari:

Opinion of the Oregon Court of Appeals, dated Feb. 16, 1983 ..... App-1

Order of the Oregon Supreme Court, dated Sept. 7, 1983 ..... App-7

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Dec. 23, 1981—Indictment filed in Circuit Court for Polk County, Oregon, accusing Elstad of burglary in the first degree.

c.Feb. 5, 1982—Elstad's motion to suppress evidence of his statements to police delivered to court (filed by clerk on Feb. 12).

Feb. 11, 1982—Trial to court. Elstad found guilty as charged.

Mar. 23, 1982—Amended trial order filed, denying motion to suppress evidence, entering finding of guilty, and continuing case for sentencing.

Apr. 14, 1982—Judgment entered. Elstad sentenced to imprisonment for not to exceed five years and ordered to make $18,000 restitution upon parole.

May 13, 1982—Elstad's notice of appeal filed.

Feb. 16, 1983—Opinion of Oregon Court of Appeals entered, reversing circuit court and remanding for new trial.

Apr. 18, 1983—State's petition for reconsideration or review filed.

Apr. 29, 1983—Order of Court of Appeals entered, denying reconsideration.

Sep. 7, 1983—Order of Oregon Supreme Court entered, denying review.

Nov. 7, 1983—State's petition for certiorari filed.

Mar. 5, 1984—Certiorari and Elstad's motion for leave to proceed *in forma pauperis* granted.

INDICTMENT

[filed December 23, 1981]

No. 29500

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR POLK COUNTY

STATE OF OREGON	)	
	)	
Plaintiff	)	ORS 164.225
	)	
vs.	)	INDICTMENT
	)	
MICHAEL JAMES ELSTAD	)	
	)	
Defendant	)	

MICHAEL JAMES ELSTAD, is accused by the Grand Jury of the County of Polk and State of Oregon by this Indictment of the crime of BURGLARY IN THE FIRST DEGREE in violation of ORS 164.225, committed as follows:

MICHAEL JAMES ELSTAD on or about the 12th day of December, 1981, in the County of Polk, and State of Oregon, then and there being, did unlawfully, feloniously and knowingly enter and remain in a building, to-wit: a dwelling located at 2144 37th NW, Salem, Polk County, Oregon, with the intent to commit the crime of theft therein, said act of the defendant being contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated at Dallas, Oregon, this 23rd day of December, 1981.

[Signatures, indorsements, and names of witnesses examined before Grand Jury omitted in printing]

MOTION TO SUPPRESS EVIDENCE

[submitted *circa* February 5, 1982]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF POLK

STATE OF OREGON,	)	
	)	
Plaintiff,	)	No. 29500
	)	
vs.	)	MOTION TO SUPPRESS
	)	
MICHAEL JAMES ELSTAD,	)	
	)	
Defendant.	)	

COMES NOW the Defendant by and through Albert C. Depenbrock, of his Attorneys, and moves the Court for an Order suppressing certain evidence and requiring the District Attorney to advise his witnesses to make no mention of said evidence, all as follows:

I.

Any evidence that Defendant made a statement, or the substance of any statement made in the living room of his home, in the presence of Detective Paul Burke, PCSO, or other police officers on or about December 17, 1981, said statements being obtained in violation of Defendant's rights under the Fifth and Sixth Amendment of the United States Constitution, and Article 1, § 11, of the Constitution of the State of Oregon, as interpreted by the United States

Supreme Court in the case of *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed2d 694 (1966), and *State v. Neely*, 239 Or 487, 395 P2d 557 (1964), and subsequent cases.

II.

Any and all written or oral statements of Defendant to police officers obtained after the statement mentioned above, said statements being "fruit of the poisoned tree" and are in violation of his rights under the United States Constitution as interpreted by United States Supreme Court in the case of *Wong Sun v. United States*, 371 US 471, 83 S Ct 407, 9 L Ed2d 441 (1963), and Constitution of the State of Oregon as interpreted by the Oregon Court of Appeals in the case of *State v. Lloyd*, 22 Or App 254, 538 P2d 1278 (1975), and ORS 133.683.

Defense Counsel has had an opportunity to review police reports and it appears that police officers went to Defendant's residence on December 17, 1981, with a warrant for Defendant's arrest; identified themselves to Defendant's mother and found Defendant in his bedroom in his underwear, required Defendant to dress and to accompany them to the living room; questioned the Defendant about the burglary for which the warrant for Defendant's arrest had issued, and elicited Defendant's confession, all prior to advising Defendant of his "Miranda" rights.

Other statements obtained followed closely in time and though proceeded [*sic*] by "Miranda" rights, were elicited as a direct result of Defendant's prior statements.

A hearing is requested on this Motion. Estimated time of hearing is 20 minutes.

DATED this 5 day of February, 1982.

[Signature omitted in printing]

TRANSCRIPT OF TRIAL

(excerpt)

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF POLK

[Title of case omitted in printing]

[February 11, 1982]

[62]

* * * * *

MIKE McALLISTER,

thereupon called as a witness on behalf of the Plaintiff, first duly sworn, was examined and did testify as follows:

(DIRECT EXAMINATION BY MR. HALBLEIB [the prosecutor])

Q. Please state your name and spell your last name.

A. Mike McAllister, M-c-A-l-l-i-s-t-e-r.

Q. And you're a deputy sheriff for the Polk County Sheriff's office.

A. That's correct.

Q. Now, you've been in the courtroom, and you've heard the testimony, Mr. McAllister. In connection with the incident that's been discussed, have you had contact with Michael James Elstad?

A. Yes, I have.

Q. Where did that contact occur?

A. First time at his residence.

Q. Remember what day?

A. No, I don't recall the exact date.

Q. Do you remember about what time?

[63]

A. I believe it was in the afternoon.

Q. You have a report that refers to that.

A. It was on the 17th, and it would have been during the day.

Q. The 17th of —

A. December.

Q. 1981.

A. '81, yes.

Q. And it was during the day. Were you in the company of anyone?

A. Deputy Paul Burke.

Q. First of all, where did you contact Mr. Elstad?

A. Into West Salem. I don't know the exact address up there. I don't recall it. It's the Elstad residence.

Q. It was his residence.

A. His parents' residence, but he resided there.

Q. Was there anyone home other than him when you contacted him the first time?

A. Yes, a lady answered the door who we identified as Mrs. Elstad.

Q. This would be his mother.

A. Yes.

Q. What happened when you and Deputy Burke arrived there?

A. We asked her if Mike was there, and she said yes,

[64]

that he was in the house, in the bedroom at that time. I don't recall if she said he was sleeping or just in bed.

Q. And did you then enter the home?

A. Yes.

Q. And what happened after you entered?

A. We asked Mrs. Elstad which bedroom it was, and she showed us. We went in there and got Mr. Elstad dressed and out of bed. I took Mrs. Elstad to the kitchen area, and Mike Elstad went to the livingroom [*sic*] area with Deputy Burke.

Q. Now, what was your purpose in taking Mrs. Elstad in the kitchen area?

A. She was not completely aware of why we were there. Obviously creates some tension and stress for her when we take the young fellow out of bed, so I explained to her.

Q. What did you explain to her?

A. The fact that we were in possession of an arrest warrant for Michael Elstad because of a burglary of one of the neighbor's residence.

Q. Basically, what was your purpose for this explanation?

A. To keep from any conflicts with her or with Mike based on the fact that she had a right to know what was going on.

Q. And then I guess you're telling me at that point Michael Elstad was arrested, is that correct?

A. Yes.

[65]

Q. And who placed him under arrest?

A. It would be a joint effort from both of us being with him, probably technically Deputy Burke.

Q. Now, while you were in that home, did you, yourself, have any conversations with Mr. Elstad?

A. None other than to ask him who he was and maybe something in the nature of how are things going.

Q. Okay. In your presence, did Deputy Burke have any conversation with him in the home?

A. There were some words exchanged, but I don't remember the exact conversation.

Q. And then I assume he was arrested, and where did you take him to?

A. To the rear seat of our vehicle and transported him back to the Sheriff's office.

Q. Was there any conversation with him during the transportation from there to — you said the Sheriff's office. I assume you mean Polk County Sheriff's office.

A. Yes.

Q. Any conversations with him in the transportation from there to the Sheriff's office?

A. Nothing that I recall out of the ordinary, just the weather and how are you doing, things of that nature.

Q. After arriving back at the Sheriff's office, then what happened?

[66]

A. Took him back to my office, myself and Deputy Burke. I advised him of his rights from a prepared rights card, and he agreed to talk to us at that point, and I typed out a statement.

MR. HALBLEIB: Now, may the witness be shown what's marked as Plaintiff's Exhibits 5 and 6 for identification.

THE CLERK: Plaintiff's Exhibits 5 and 6.

MR. HALBLEIB: Q. Look at 6 first. What is it?

A. It's a prepared card that our officers use for the Miranda rights.

Q. Have any signatures on it?

A. Yes, it does.

Q. Whose signatures appear on that card?

A. Mike Elstad and my signature.

Q. Okay. Now, did Mike Elstad sign that card in your presence?

A. Yes, he did.

Q. And is that his signature?

A. Yes, it is.

Q. And then the other signature on it is yours, is that correct?

A. Yes.

Q. Now, what basically does that card reflect? You said it was a standard Miranda rights card. What does it

[67]

reflect?

A. He's aware of his basic Constitutional rights. Would you like them read off here?

THE COURT: May I inquire at this juncture, do you intend to introduce oral statements made by this defendant?

MR. HALBLEIB: Yes, we do.

THE COURT: Are you objecting to the admissibility of those?

MR. DEPENBROCK [defense counsel]: Any previous statements taint subsequent statements tainted by previous statements.

THE COURT: Are there other statements that were made by the defendant previous to this one?

MR. HALBLEIB: There was apparently comment made by the defendant prior to his arrest to Deputy Burke which would probably have some relevance here.

THE COURT: Are we in the in-camera hearing now on the admissibility?

MR. HALBLEIB: I think I can probably finish out the rights card first before we get into the in-camera hearing.

THE COURT: Very well.

MR. HALBLEIB: Q. Now, did he appear to understand those rights then?

A. Yes, he did.

Q. And then he signed that card.

A. Yes, he did.

[68]

Q. Were there any threats made to him?

A. No.

Q. Any promises made?

A. No.

Q. Anybody else to the best of your knowledge make any threats or promises to him?

A. No.

Q. And then he voluntarily signed that card for you.

A. Yes.

MR. HALBLEIB: Your Honor, I'd offer the card in evidence.

MR. DEPENBROCK: No objection.

THE COURT: It will be received. Did you say you read the card to ' im?

WITNESS: Yes.

THE COURT: Very well.

MR. HALBLEIB: Q. Then following the signing of that card, then he gave you a statement, is that correct?

A. Yes, he did.

Q. And did you type that statement out?

A. Yes, I did.

Q. And did he then sign the statement?

A. Yes, he did.

Q. I'd ask you to examine what's been marked as Plaintiff's Exhibit #5 for Identification, ask what that is.

[69]

A. That's a statement taken in my office between myself and Deputy Burke and Michael Elstad at about 1645 hours on December 17th, 1981, that's located in the Sheriff's office.[1]

Q. And was there anyone present when that statement was taken other than you and Mr. Burke and Mr. Elstad?

A. No.

Q. Were there any threats made to him?

A. No.

Q. Any promises made to him?

A. No.

Q. Anybody else make any threats or promises to the best of your knowledge?

A. No.

[1]This statement is reprinted at pp. 40-42, below.

Q. Now, to the best of your knowledge, was that statement given freely and voluntarily?

A. Yes.

MR. DEPENBROCK: Objection, move to strike. It's just a conclusion of the witness.

THE COURT: Sustain the objection.

MR. HALBLEIB: Q. I think you said you typed the statement out.

A. Yes.

Q. Did Mr. Elstad read the statement over then?

A. Yes.

Q. Did you read it to him as well?

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A. I read most of it to him, because I had some mistakes in it and I wanted him to initial those, so I pointed them out to him.

Q. Did he then initial those mistakes in your presence?

A. Yes.

Q. Did he then sign that statement?

A. Yes.

Q. Did anybody else sign it?

A. Paul Burke and myself.

Q. Was Mr. Elstad's signature made in your presence?

A. Yes.

Q. And you recognize that signature as being his?

A. Yes.

Q. Do you recognize the signature of Paul Burke?

A. Yes.

Q. Was that made also in your presence?

A. Yes.

MR. HALBLEIB: Your Honor, I think that would be the foundation.

THE COURT: Are you going to offer the exhibit?

MR. HALBLEIB: I would offer it.

THE COURT: Show the exhibit to counsel, please.

MR. DEPENBROCK: I'd have an objection, and I'd want to call witnesses in support of my objection.

THE COURT: The objection goes to, you say, taint?

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MR. DEPENBROCK: I say this statement is a product of a previous statement taken of the defendant without the advice of his rights that was required, and under the law it should be excluded.

THE COURT: All right. You have any more testimony on this issue then, Mr. Halbleib?

MR. HALBLEIB: I have some testimony but not on that particular issue.

THE COURT: All right. Anything more of this witness on this issue?

MR. HALBLEIM: No, your Honor. I would offer that.

THE COURT: You have any cross-examination of this witness on this particular issue?

MR. DEPENBROCK: I'd prefer to talk to the other officer first.

THE COURT: All right. You may step down, Officer, if you will, please.

Call your next witness on this issue.

MR. HALBLEIB: We'd call Deputy Paul Burke.

- - -

PAUL BURKE,

thereupon called as a witness on behalf of the Plaintiff, first duly sworn, was examined and did testify as follows:

(DIRECT EXAMINATION BY MR. HALBLEIB)

[72]

Q. Please state your name and spell your last name for the record.

A. My name is Paul Burke, B-u-r-k-e.

Q. And are you a deputy sheriff with the Polk County Sheriff's office?

A. Yes, I am.

MR. HALBLEIB: Your Honor, I do have a couple of questions I would ask of Deputy Burke that have nothing to do with this issue. You want me to cover those now or wait?

THE COURT: You may and see if there's any objection. You may proceed.

* * * * *

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* * * * *

MR. HALBLEIB: Your Honor, let me ask one question, how the court wishes to proceed.

THE COURT: I'd like to confine this to the admissibility of the statements.

MR. HALBLEIB: At this point I'll go into that.

Q. Deputy Burke, if we can shift forward to the 17th of December, 1981, did you on that date have occasion to have contact with Michael James Elstad?

A. Yes. I did.

Q. And what were the circumstances?

A. Detective McAllister and myself went to the Elstad residence, which is approximately one block directly east of the Gross residence, knocked on the door. Mrs. Elstad answered the door. We asked if her son Mike was home. She stated

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that he was. We identified ourselves as police officers, advised her that Mike may have some very serious problems and we'd like to speak with him. She invited us into the residence, told us that Michael was in the bedroom.

At that point we asked her to show us which bedroom, which she did. We went to that bedroom. Michael was laying in bed dressed in either a pair of shorts or gym shorts, I don't recall which.

We asked Mike to get up. He was listening to the stereo. He got up, dressed himself and came out to the living room area.

Q. Okay. Now, did Deputy McAllister at that time take Mrs. Elstad to another portion of the house?

A. Deputy McAllister took Mrs. Elstad to the kitchen area, which is only basically — I don't know, ten or twelve feet from the livingroom [*sic*] area, to advise her of just what the situation was.

A. Okay. Now, after getting Mr. Elstad out of bed, you said you brought him to the livingroom [*sic*] area of the house.

A. Yes.

Q. And was he allowed to dress before he came out?

A. Oh, yes!

Q. After getting in the livingroom [*sic*] area of the house, what happened?

A. I sat down with Mr. Elstad and I asked him if he

[75]

was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did, and also added that he heard that there was a robbery at the Gross

house. And at that point I told Mr. Elstad that I felt he was involved in that, and he looked at me and stated, "Yes, I was there."

Q. And then what did you do?

A. Had Detective McAllister take him to the rear of the patrol unit, advised Mrs. Elstad that he would be taken to Polk County Sheriff's office in Dallas and she could find out any information regarding bail at that time.

Q. So the only statement that he made to you at that time was yes, he was there.

A. That's correct.

Q. Did you make any further inquiry of him?

A. I did not. At that time I talked to Mrs. Elstad in the house for approximately a minute to a minute and a half, and at that point Mr. Elstad drove up into the driveway or up into the street up in front of the house.

At that point Mrs. Elstad and myself went out to see her husband. I advised Mr. Elstad of what I had just told to Mrs. Elstad.

He at that point went to the rear of the patrol unit where Mike Elstad was and opened the rear door and had a

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conversation with him.

Q. Did you overhear that conversation?

A. Yes, I did.

Q. What was the conversation?

A. Mr. Elstad told his son that "I told you that you were going to get in trouble. You wouldn't listen to me. You never learn." And he became quite agitated to the point where I basically stepped between Mr. Elstad and the car and asked him to step back.

Q. Did Michael Elstad make any response to his father's comments?

A. He said a few words. I don't quite recall what they were. He acknowledged the fact that his father was angry, and I can't tell you his exact words. I don't recall.

Q. From that point you took him to the Sheriff's Department, is that correct?

A. That's correct.

Q. And once you arrived at the Sheriff's Department, what did you do? Where did you go?

A. To Deputy McAllister's office.

Q. At Deputy McAllister's office what did you do?

A. Deputy McAllister advised Mr. Elstad of his rights from a card, asked him if he understood those rights. The answer was affirmative.

Q. Did he sign a rights card?

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A. Yes, Mr. Elstad signed the card, and Deputy McAllister signed the bottom line.

Q. And then after that, what happened?

A. Mr. Elstad gave a statement as to what occurred on the 11th of December of that year. And at the time he was giving this statement orally, Deputy McAllister was typing it.

Q. Do you have Exhibit 5 in front of you?

A. Yes, I do.

Q. Okay. I'd ask if you recognize that.

A. Yes.

Q. And what is it?

A. It is a statement taken at 1645 hours, which would be 4:45, on December 17th. The location was McAllister's office. Present were McAllister, myself and Michael Elstad. And it is a two page statement, typed, pertaining the [*sic*] the events that took place on the — on Friday the 12th — the 11th of December.

Q. Now, after that statement was typed out, was it signed in your presence?

A. Yes, it was.

Q. And who was it signed by?

A. Signed by Michael Elstad, by McAllister and myself.

Q. Were there any corrections initialed on it?

A. Yes, there are several typographical errors which are initialed, misspelled words, etc. There is also a

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parenthesized, handwritten paragraph in the bottom which was an afterthought that is also initialed.

Q. And who wrote the handwritten paragraph?

A. It appears to be McAllister's handwriting, and I was present when the statement was made by Mr. McAllister [*sic*].

Q. Now, let's go back now to the arrest. At any time prior to the arrest, did you make any threats to Mr. Elstad?

A. No

Q. Did you make any promises?

A. No promises.

Q. Did you ask him any more about the burglary than what you just related?

A. Not until we arrived at the office.

Q. Okay. Did Mr. McAllister ask him anything about a burglary?

A. To my recollection, there was no questioning at all on the ride back regarding the burglary.

Q. Was there any question by Mr. McAllister at the house?

A. Not to my recollection.

Q. Okay. Was there any threats or promises made by anybody at the house?

A. There was not.

MR. HALBLEIB: Your Honor, I would offer #5 again. I think that would be the basis of the state's testimony on

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this matter.

THE COURT: It's twelve o'clock, we'll recess for lunch. You may step down if you will, Officer. I have another matter at one o'clock. It will take about 30 minutes I'm told. We'll recess this trial until 1:30.

(NOON RECESS TAKEN)

THE COURT: You may proceed.

MR. HALBLEIB: Q. Deputy Burke, there's one question that I neglected to ask you earlier. After you had picked or after you arrested Mr. Elstad, you indicated you'd gone back to the Polk County Sheriff's office. Was that a direct trip back or were you diverted somewhere?

A. It was not a direct trip back, we were diverted. Approximately 30 to 40 seconds after leaving the Elstad residence, we received a robbery call on Augusta Street in West Salem. We were the closest unit, so we responded to that robbery with Mr. Elstad in the rear seat of the car.

Q. Was there any conversation with Mr. Elstad on that or anything else?

A. The only conversation at that time was between the radio dispatcher and our unit.

MR. HALBLEIB: We have no other comments. I think that was the only question that I had.

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[80]

(CROSS-EXAMINATION BY MR. DEPENBROCK)

Q. Detective Burke, how long have you been employed by the Polk County Sheriff?

A. Just about three years.

Q. Why was it that you went to Mike Elstad's home on December 17th?

A. To arrest Mike Elstad.

Q. And you had with you a warrant for his arrest, did you not?

A. Yes, we did.

Q. You went to the door, his mother answered. You told her you were police officers I take it, identified yourselves.

A. That's correct.

Q. His mom led you to him in his bedroom.

A. Yes, sir.

Q. Was the door open or closed?

A. I don't recall. The best of my recollection, Mrs. Elstad went first, Detective McAllister was second, and I was third, and I can't really say whether the door was open or closed.

Q. Mike under the covers or was he laying on the bed or what was he doing?

A. He was laying on the bed. He did have, I believe, a sheet or a blanket over him or at least midway. He was bare from the shoulders to the chest.

[81]

Q. Before anything was said between anybody, did his mother leave the room or was she still present?

A. I don't recall.

Q. Okay. Do you recall who was the first to initite any conversation?

A. I believe I asked him or McAllister asked him, I'm not sure which, to please get up and get dressed and come out in the other room.

Q. You don't remember if his mother was present then or not.

A. I believe she was but I'm not completely certain. I believe she was standing either in the doorway or she had gone back into the livingroom [*sic*] area.

Q. Did you identify yourself to him as a police officer?

A. Yes.

Q. Did you ask him his name?

A. Yes.

Q. You told him to please get dressed.

A. Yes.

Q. Did you stay in the room while he dressed?

A. Yes, we did.

Q. Both of you?

A. Yes.

Q. Did you tell him he was under arrest?

A. Not in the bedroom, no.

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Q. Did you tell him he was not under arrest?

A. No.

Q. In fact he was under arrest, was he not?

A. Yes.

Q. When you left, you walked to a hallway I take it, a short hallway to the livingroom [*sic*].

A. Yes, a very brief — I don't know, a matter of 10 or 15 feet possibly, 12 feet.

Q. Okay. Did you have your hands on him at that time?

A. I did not.

Q. One in front, one in back, escorting him?

A. I can't answer that, I'm not sure. I believe I went out to the living area first, and Mr. Elstad and McAllister was at the rear, but I'm not complete [*sic*] certain.

Q. You got to the livingroom [*sic*] and was his mother still there, still with you, or had she already gone to the kitchen?

A. As soon as we got to the livingroom [*sic*], Detective McAllister asked Mrs. Elstad to step to the

kitchen area with him, and Michael sat down on, I believe, the sofa.

Q. And where did you sit down or did you sit?

A. I don't believe I sat. I believe I stood.

Q. Did you hear Detective McAllister tell Mike's mom that there was — that you had a warrant for his arrest?

A. I don't recall hearing it. I know that at a little bit later in the conversation I did tell her.

[83]

Q. Okay. Before or after you talked to Mike?

A. After.

Q. You stood up, then you initiated some conversation, you spoke next, did you?

A. Pardon me?

Q. You got to the living room.

A. Yes.

Q. Defendant sat down and you stood up.

A. Yes.

Q. And then you initiated — you said something.

A. Yes, I did, I said, "You know why we're here."

Q. And what was his repsonse to that?

A. His response was no, he did not know why we were there.

Q. And what did you say following that?

A. I asked him if he knew a Mr. Gross.

Q. That was your exact words, "Do you know Mr. Gross?"

A. It may not have been the exact words, but it was basically the exact words. I may have said do you know the Gross family or do you know Mr. Gross or very similar words to that effect.

Q. Did you say anything like I have reliable information that you're involved in a burglary?

A. I don't recall that.

Q. And in response to your question to him as to

[84]

whether or not he knew Mr. Gross, what, if anything, did the defendant say or do?

A. He looked around a little bit toward the kitchen to where his mother was and looked back at me and fidgeted just a bit and said he had heard about the burglary.

Q. Okay.

A. And I asked what he knew about the burglary, and he said, "I was there."

Q. You asked him what do you know about the burglary?

A. Yes.

Q. Okay. At any time prior to making any of these statements or hearing anything of the defendant, did you advise him of his rights, what are commonly known as Miranda rights?

A. Not at that point.

Q. And by Miranda rights I mean those same rights that were on the printed card that I think has been admitted as State's Exhibit 5.

A. That's correct, I understand what you mean.

Q. Okay. You mentioned earlier that you overheard some conversation between the defendant's father and the defendant.

A. Yes.

Q. Prior to that, had you advised him of his rights?

A. Had I advised him?

[85]

Q. Had anyone?

A. I had not, and I don't know — Detective McAllister took Mr. Elstad from the house to the vehicle, and I remained inside with Mrs. Elstad, speaking with her, at which time I told her that yes, we had an arrest warrant, that her son was in custody and why and where she could check for bail or whatever.

Q. Okay. And when was the first time that you, if you did, advised Mr. Elstad of his rights? When was that?

A. I never did. McAllister did in my presence, the first I was aware of it, at his office later that afternoon.

Q. That would have been after the ride in the car.

A. That is correct.

Mr. DEPENBROCK: No further questions.

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(REDIRECT EXAMINATION BY MR. HALBLEIB)

Q. If I understand that correctly, Deputy Burke, the only exchange of questions that occurred between you and Mr. Elstad were the ones you related.

A. Yes

Q. Where you asked him if he knew Mr. Gross.

A. Yes.

Q. And asked him what he knew about the burglary.

A. Yes.

MR. HALBLEIB: I'd have no further questions.

[86]

(RECROSS-EXAMINATION BY MR. DEPENBROCK)

Q. With the exception of the statements that we talked about in the livingroom [*sic*], the defendant's statements which you might have overheard — I think you said you acknowledged that his father was mad at him, so disregard that. With the exception of the statements made in the livingroom [*sic*] and the formal written statement, was there any other statement made by the defendant to you regarding this case in any way?

A. Was there any other statement made by him to me? I'm not sure I understand what you're asking me.

Q. Strike the whole question. I think you probably answered it. You told me you didn't say anything on the way in. I suppose if anything comes up we can deal with it at such time.

No further questions.

MR. HALBELEIB: I have no further questions of Deputy Burke concerning this matter. I have questions concerning other matters.

- - -

(EXAMINATION BY THE COURT)

Q. Officer Burke, how much time or space involved between the first time you talked to this man in the living room and the time he was advised of his rights in the Sheriff's office? How many miles and how much time was involved?

A. Your Honor, what happened was we were transporting

[87]

him back to the Sheriff's office. We got the radio call regarding the robbery which we had to respond to. We went straight to the Augusta Street location. We left Mr. Elstad in the back of the car.

Detective McAllister took the rear of the house, and I took the front of the house so I could watch the house and the car at the same time.

Other units arrived, and we arranged for another unit to transport Mr. Elstad to the jail. And we stayed there conducting interviews perhaps as much as 45 minutes or an hour may have passed before McAllister and myself got back here to the Sheriff's office and began the interview with Mr. Elstad.

Q. Who in fact transported him to the —

A. I believe it was Corporal Peters.

THE COURT: All right.

MR. HALBLEIB: I have no more witnesses on this issue.

MR. DEPENBROCK: I'd like to question Detective McAllister briefly, your Honor.

THE COURT: Very well. Step down, Officer, please.

You've already been sworn, haven't you? Just have a chair.

MR. HALBLEIB: He's already been on the stand on the same issue.

[88]

THE COURT: Yes, right.

(DIRECT EXAMINATION BY MR. DEPENBROCK)

Q. You've heard the testimony of Detective Burke, do you recall any other initial Miranda rights given to the defendant other than those given at the station?

A. No, I don't believe so.

Q. Do you remember any other statements being made? Did you hear any other statements made by the defendant other than those that Detective Burke has referred to in the living room and the formal statement made by the defendant at the station?

A. I didn't hear those made in the livingroom [*sic*].

Q. Did you hear of any others?

A. No.

Q. The substance of what Detective Burke says, happenings at the defendant's house, does that agree with your recollection?

A. Yes.

MR. DEPENBROCK: No other questions.

MR. HALBLEIB: No other questions.

THE COURT: You may step down.

You have witnesses you want to call now on the in-camera hearings?

MR. DEPENBROCK: Not now, but I'd like to briefly argue the point.

[89]

THE COURT: All right.

MR. DEPENBROCK: I submitted my memorandum.

THE COURT: I read it.

MR. DEPENBROCK: And I think that based upon the memorandum and the testimony of witnesses that there's no question there was interrogation without the Miranda rights. And the officer testified he was under arrest. He was in custody, and he asked him things which were clearly interrogation.

A fairly recent case is that case of Rhode Island versus Innis [446 U.S. 291 (1980)] I believe, which says that anything out of the ordinary and the police should know it was readily likely to elicit an incriminating response, not just expressed questioning but any words or actions.

Seems to me like the proper procedure would have been once he had the defendant's name to tell him you are under arrest and you have a right to remain silent. Anything you say can and will be used against you, so on and so forth.

That wasn't done. Because of that, that statement in the livingroom [*sic*] and those statements which followed in the brief time thereafter should be suppressed.

That Mendacino case [*State v. Mendacino*, 288 Or. 231, 603 P.2d 1376 (1979)] is right on point on the

subsequent statements. They had previous tainted statements. They had the fellow in custody for 72 hours. He was advised of his rights prior to the subsequent statement. The

[90]

subsequent statement was taken by somebody else. The cat had already been let out of the bag. So I think if the first is bad, I think the second is bad.

THE COURT: Anything the State wants to say about this matter?

MR. HALBLEIB: Basically, your Honor, probably State versus Brewton [238 Or. 590, 395 P.2d 874 (1964)] is what we're talking about. The burden of proof is on the State to show the voluntariness to the satisfaction of the court.

We have two questions here, and Mr. McAllister indicated that he separated the two, and they were explained to him before they actually, physically arrested him — to the mother to avoid any confrontation.

The only statement that I have seen or heard come out of that was the statement to the effect of I was there, which doesn't say much of anything at all.

He was arrested and then transported and finally read his rights at the Sheriff's office, and then and

only then was there any questioning going on of the burglary and details, and I think that's perfectly permissible.

THE COURT: May I see Exhibit 6, please. Exhibit 6 has been received, hasn't it?

MR. HALBLEIB: Yes, it has, your Honor.

THE COURT: Mr. Depenbrock, this goes to the admissibility of State's Exhibit 5, is that where we are?

[91]

MR. HALBLEIB: That's where we are.

THE COURT: I'm going to deny the motion to suppress Exhibit #5 for these reasons: I'm of the view that the statements made by the defendant at the house in response to the officer's question: "What do you know about the robbery?" must be suppressed. It would not be admissible because this man was not advised of his Miranda warnings, his Constitutional rights.

However, the statement taken at the jail would be admissible because the evidence shows that there was no taint between the first statement "I was there" and the second. I have not seen the contents of the second statement, but assuming that there is incrimination [*sic*] evidence, statements in that written document, that would be admissible.

There was a break in the events from 45 to 50 minutes away from the courthouse and being transported by the police officer, and I think the taint — there's no showing of any taint whatsoever.

There is a showing by the State that the statements were made freely and voluntarily. The rights card is in evidence. The officer read the rights to him. They are numbered one through seven. They appear on Exhibit #6, and on the reverse side is the question: "Do you understand these rights" And the word y-e-h appears after that, which I assume is yes. "Do you have any questions about your rights?" Answer: "No."

[92]

"Having these rights in mind, do you wish to talk to us now?" And it says, "Y-e-h, I do."

And I find that the State has established that the statement was given freely and voluntarily and knowingly and will not suppress Exhibit #5.

MR. DEPENBROCK: Thank you, your Honor. Might I add one request, that the statement be admitted in the proceeding we just had to determine its admissibility? You said you had not seen it, and I overlooked that point. May I ask the Court to reconsider its ruling after reading the statement?

THE COURT: All right.

MR. DEPENBROCK: Thank you, your Honor.

MR. HALBLEIB: Just one other point of clarification, your Honor. The state has never offered the statement made between the arrest and the rights and did not intend to make an offer.

THE COURT: I realize that.

All right, now we'll get back to the trial of the case. * * *

EXHIBIT 5: ELSTAD'S STATEMENT

DECEMBER 17, 1981

TIME: 1645 hours
LOC: office (mCAllister's) [*sic*]
PRESENT: MIKE MCALLISTER, PAUL BURKE, & MICHAEL ELSTAD

I, Michael Elstad make the following statement after being advised of my rights per a prepared rights card and acknowledging such rights and wish to speak to the above officers about the burglary and my involvment [*sic*] at the Gross residence.

On Friday 12-11-81 Jeff Radley and myself went to Robert Miller's residence out in the Keizer area. I have known Robert since I went to school at McNary HIgh [*sic*] School with him. The reason that I was with Jeff is that he had his mother's car (a white over dark brown car I beleive [*sic*] a Buick) and he drove me to Robert's house. When we were at Robert's house I told him I knew a house that the people were not home at and they had a lot of nice furniture. Robert said that he knew a person that could use the furniture AND that I should go see Robby Gray; and he gave me the address (Apt B in the Comstock Apts, "Go down Market Street past Lancaster to the Comstock Apts,)"

Jeff and myself went and told Robby about the house and Robby gave each of use [*sic*] twenty-five

dollars (in cash). Robby said that he would like to go look at the house and look at it. Jeff and I then left and Jeff took me home and I beleive [*sic*] that he went home.

Robby Gray called about 1530 hours or 1600 hours (3:30 or 4:00) and said he would be coming up to look at the house.

At about 1600 hours (4:00) a brown and lighter colored brown van drove by and I went out to see if it was Robby. I walked down to a turn around in the road and Robby was already standing in the road waiting for me. I then got in the van and found that tve [*sic*] driver was a person that I know by "Pat", and another guy sitting in the passenger seat (blond curly hair, 5/8, 140 lbs.) We then drove by the Gross's house and Robby and I got out of theh [*sic*] van and walked back to the house and I then opened the sliding glass door by moving it up and down. Robby and I then went in the house and Robby picked up a camera in a brown case and we both left. I then told Robby that he should come back in the night and he said that they would go back to his house and come back later.

I then walked home and did not know anymore [*sic*] about the burglary until Robby called me a couple of days later and that he had heard that his name had been mentioned and that he was going to leave.

Robby also said that he did not want any of the stuff and I told him that I did not want any of it any [*sic*] that I did not want anything to do with it.

Taken by /s/ Mike McAllister /s/ Paul Burke

No Furhter [*sic*] knowledge & the end of statment [*sic*]. /s/ Mike Elstad

[Handwritten addendum:] "After leaving the house Robby & I went back to van & Robby handed me a small bag of grass" M.J.E.

AMENDED TRIAL ORDER

[filed March 23, 1982]

No. 29500

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR POLK COUNTY

STATE OF OREGON,	)	
	)	
Plaintiff,	)	
	)	AMENDED TRIAL ORDER
vs.	)	
	)	
MICHAEL JAMES ELSTAD,	)	
	)	
Defendant.	)	

The above entitled matter came regularly before the Court, the Honorable Darrell J. Williams presiding on the 11th day of February, 1982, the defendant appearing in person, and with his attorney, Albert C. Depenbrock, and the plaintiff appearing by Duane W. Halbleib, Deputy District Attorney for Polk County, Oregon, this having been the time set for the defendant's trial upon an Indictment charging him with the crime of BURGLARY IN THE FIRST DEGREE.

Prior to commencement of trial the defendant indicated to the Court that he desired to waive his right to have the matter tried by jury and the Court questioned the defendant and determined that such waiver was being made freely, knowingly and

voluntarily in all respects and the Court thereupon allowed the defendant to execute in open Court a written waiver of jury trial.

Opening statements of counsel were waived and witnesses were called and examined on behalf of the plaintiff. The defendant made objection to entry of a written statement by the defendant concerning the matter being tried before the Court and the matter was heard on defendant's objection and motion to suppress the written statement in an *in camera* hearing. Thereafter the Court found that Polk County Sheriff's Deputies had gone to the defendant's house armed with an arrest warrant and that the defendant, before being arrested, but while in custody, had been asked what he knew about the burglary and the defendant had responded that he was there; the Court finding that this particular statement would not be admissible because the defendant had not been advised of his Miranda rights before the question had been asked by the Sheriff's Deputies. The Court then further found that under the facts presented the defendant had been arrested and transported to the Polk County Sheriff's Office where he had been properly adivsed [*sic*] of his Miranda rights and had in fact signed a card acknowledging those rights. That after the defendant had acknowledged those rights the defendant then, at that time, consented to give a

statement to Polk County Sheriff's Deputies concerning the burglary in question. The Court further found that his written statement was given freely, voluntarily and knowingly by the defendant after he had waived his right to remain silent and have counsel present which waiver was evidenced by the card which the defendant had signed. The Court further found that his second written statement was not tainted in any way by the previous brief statement between the defendant and the Sheriff's Deputies that had arrested him. After making these findings, the Court then ruled that the defendant's objection to entry of the written statement would be overruled and the defendant's Motion to Supress [*sic*] such written statement would be denied. The defendant thereafter rested without calling witnesses and closing arguments of counsel were waived. The Court then determined that the State had proven the defendant guilty of the crime of BURGLARY IN THE FIRST DEGREE beyond a reasonable doubt and to a moral certainity [*sic*] and the Court thereupon found the defendant guilty of the crime as charged.

The Court then found that a presentence investigation should be ordered and directed that the State of Oregon Corrections Division/Polk County Community Corrections shall make the presentence investi-

gation and thereafter the Court being fully advised in the premises:

IT IS, THEREFORE, ORDERED that the Court shall and does find the defendant Guilty of the crime of BURGLARY IN THE FIRST DEGREE and that such verdict shall be and is hereby entered in record herein, and

IT IS FURTHER ORDERED that the State of Oregon Corrections Division/Polk County Community Corrections shall conduct a presentence investigation on the above name [*sic*] defendant and shall submit a report of the same to the Court, and

IT IS FURTHER ORDERED that the matter shall be continued for sentencing pending the receipt of the presentence investigation.

Dated at Dallas, Oregon, this 23rd day of March, 1982.

[Signature omitted in printing]

JUDGMENT

[filed April 14, 1982]

No. 29500

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR POLK COUNTY

STATE OF OREGON, Plaintiff, vs. MICHAEL JAMES ELSTAD, Defendant.	)	SENTENCING ORDER

The above entitled matter came regularly before the Court on the 12th day of April, 1982, the Honorable Darrell J. Williams presiding, the defendant appearing in person and with his attorney, Albert C. Depenbrock, and the plaintiff appearing by Duane W. Halbleib, Deputy District Attorney for Polk County, Oregon, this having been the time set for the defendant's sentencing upon the defendant's conviction for the crime of BURGLARY IN THE FIRST DEGREE.

The Court inquired of the defendant as to whether the defendant had seen the presentence report and the defendant replied that he had and that certain material contained in the report was inaccurate and the Court after hearing the defendant

informed the defendant that the material contained in the report would be considered in light of the defendant's statement.

The Court then heard statements of respective counsel and offered the defendant an opportunity to make a statement on defendant's own behalf and at the conclusion thereof the Court being fully advised in the premises:

IT IS, THEREFORE, ORDERED that upon the defendant's conviction for the crime of BURGLARY IN THE FIRST DEGREE the defendant shall be committed to the legal and physical custody of the State of Oregon Corrections Division for a maximum term of five (5) years for the reasons enumerated in the Court record but not set out in this order would show that the defendant can only be rehabilitated in a facility available to the Corrections Division. It is recommended by the Court to the Corrections Division that due to the defendant's age that the defendant be allowed to serve this sentence in the Oregon State Correctional Institution.

IT IS FURTHER ORDERED that upon parole the defendant shall make restitution to the Clerk of this Court in the amount of $18,000.00 for damages sustained as a result of the defendant's criminal activity, such payments shall be made in payments of not less than $300.00 per month until the entire sum of restitution is paid in full. Such restitution

shall be forwarded by the Clerk of the Court to Gilbert Gross, the victim of the crime whose address shall be furnished to the Clerk of the Court by the Polk County Release Assistance Officer, and

IT IS FURTHER ORDERED that the defendant having not waived his right to remain in the Polk County Jail for at least 48 hours after the pronouncement of sentence shall not be transported to the facility of the Corrections Division of the State of Oregon to begin serving defendant's sentence until after 11:30 a.m. on April 14 1982.

Dated at Dallas, Oregon this 14th day of April, 1982.

[Signature omitted in printing]

OPINION OF OREGON COURT OF APPEALS

[Opinion set forth in full as Appendix A, pages App-1 through App-6 of the printed petition for certiorari]

ORDER OF OREGON SUPREME COURT DENYING REVIEW

[Order set forth in full as Appendix B, page App-7 of the printed petition for certiorari]

Office - Supreme Court, U.S.
FILED
MAY 19 1984
ALEXANDER L. STEVAS,
CLERK

(3)

No. 83-773

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OREGON,

Petitioner,

v.

MICHAEL JAMES ELSTAD,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR PETITIONER

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50 pp

QUESTION PRESENTED

Does the Self-Incrimination Clause of the Fifth Amendment require the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier admission from the defendant without advising him of his rights, even though the trial court found that the earlier admission was otherwise voluntary, and that it did not "taint" the subsequent confession?

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I. In applying the test of admissibility announced in *United States v. Bayer*, initial confessions given under circumstances partaking of actual coercion must be distinguished from those which are inadmissible only because they involve *Miranda* violations. When this distinction is made, the conclusion necessarily follows that the giving of *Miranda* warnings removes the prior illegality and the subsequent confession is admissible. 14

II. There are sound justifications, provided by doctrinal developments since *United States v. Bayer*, to extend the "fruit of the poisonous tree" analysis to confessions that follow statements which are inadmissible under *Miranda*. Through a principled application of the derivative evidence doctrine, however, the conclusion should be that *Miranda* warnings and a valid waiver adequately attenuate the initial illegality unless the extreme circumstances of a particular case require suppression as a deterrent to future unlawful conduct. 25

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing defendant Elstad's burglary conviction (Petition for Certiorari, Appendix A) is reported at 61 Or. App. 673, 658 P.2d 552 (1983). The order of the Supreme Court of the State of Oregon denying the State's petition for discretionary review of the decision of the court of appeals (Petition for Certiorari, Appendix B) is reported at 295 Or. 617, 670 P.2d 1033 (1983).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The opinion of the Oregon Court of Appeals was entered on February 16, 1983. The Supreme Court of Oregon denied a timely petition for discretionary review on September 7, 1983. The State's petition for writ of certiorari was filed on November 7, 1983, within the 60-day period prescribed by Rule 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V provides in pertinent part:

> "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."

United States Constitution, Amendment XIV provides in pertinent part:

"Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Summary of Facts

On the afternoon of December 17, 1981, police officers Burke and McAllister went to the residence of defendant Elstad's parents with a warrant for defendant's arrest. Defendant's mother admitted them and showed them to defendant's bedroom where defendant was lying on his bed, partially dressed, listening to the stereo. (J.A. 8-9, 18-19). At the officers' request, he dressed and went into the living room. Officer McAllister stepped into the nearby kitchen with defendant's mother to explain the situation, while Officer Burke stayed in the living room with defendant. (J.A. 9, 19).

Both officers considered defendant to be under arrest at this point, although defendant was not told he was under arrest. (J.A. 10, 27). Officer Burke stayed with defendant in the living room, and defendant sat down on the sofa. Burke sat down with defendant and asked him if he knew why the officers were there. Defendant said he did not. The officer inquired whether defendant knew Mr. Gross or the Gross family. Defendant said he did. Defendant also said that he had heard there had been a "robbery" at the Gross house. Burke replied that he thought defendant was involved in the burglary, and asked defendant what he knew about it. Defendant responded, "I was there." (J.A. 18-20, 28-29). Burke did

not ask any further questions of defendant at that time, nor did he otherwise attempt to clarify the nature or extent of defendant's participation in the crime, if any.

Defendant was placed in the patrol car, and one of the officers explained bail procedures to defendant's mother. Defendant's father arrived home at that time. After talking to the police, he became agitated with his son, went to the patrol car, and began to reprimand defendant. Officer Burke intervened and asked defendant's father to move away from the car. (J.A. 20-21).

The officers did not question defendant about the burglary during the ride to the police station. (J.A. 10-11; 23). They were required to respond to a possible crime, and a third officer who met them at the scene transported defendant to the police station. (J.A. 32-33). The two arresting officers joined defendant at the police station approximately 45 to 60 minutes later. They and defendant then went to Officer McAllister's office. (J.A. 11, 33). McAllister advised defendant of his rights by reading from a standard *Miranda* rights card. (J.A. 11; Ex. 6 rec'd at J.A. 13). McAllister asked defendant if he understood the rights, and defendant answered affirmatively. (J.A. 21). It appeared to Officer McAllister that defendant in fact understood his rights. (J.A. 13). Both McAllister and defendant signed the *Miranda* rights card. (J.A. 11-12; 21).

Defendant indicated he was willing to talk to the officers, and he gave a statement describing what

occurred on December 11, the date of the burglary. Officer McAllister typed the statement as defendant gave it orally. The statement was taken at 4:45 p.m. (J.A. 11, 22). After McAllister typed the statement, defendant reviewed it. McAllister also read it back to defendant. (J.A. 15). Inaccuracies, such as typographical errors and misspellings, were corrected and initialed by defendant, and defendant signed the two-page statement. (J.A. 15, 22). In it, defendant described who was involved in the burglary, what information he gave others about the premises, what he was paid for information about the residence and who paid him, and the extent of his involvement in aiding the entry. (Ex. 5 rec'd at J.A. 39). No threats or promises were made to defendant either at defendant's residence or at the police station when defendant gave his statement. (J.A. 13-15, 23).

B. Rulings Below: The Admissibility of Defendant's Post-*Miranda* Warning Confession.

Defendant was charged with first degree burglary in the Circuit Court for Polk County, Oregon. (Or. Rev. Stat. § 164.225). At trial, he moved to suppress his oral and written statements to police. Defendant's written motion to suppress urged that his initial statement ("I was there") was inadmissible because he had not been given the warnings prescribed in *Miranda v. Arizona*, 384 U.S.

436 (1966). (J.A. 4-5).[1] The state from the outset conceded the inadmissibility of the pre-warning statement and advised the court that it did not intend to offer the statement into evidence. (J.A. 39).[2] The state, however, offered defendant's written confession. Defendant objected to its admission because his initial oral statement to police, which was inadmissible under *Miranda v. Arizona*, *supra*, let the "cat out of the bag" and the subsequent written confession therefore was a "tainted" product of the initial *Miranda* violation. (J.A. 5, 16, 35-36). Defendant did not testify or otherwise present any evidence to establish a factual nexus between the pre-warning admission and the post-warning confession. The trial court denied the defendant's motion to suppress:

> "THE COURT: I'm going to deny the motion to suppress Exhibit #5 for these reasons: I'm of the view that the statements made by the defendant at the house in response to the officer's question:

---

[1] Although defendant's written motion also relied on state constitutional grounds, he treated the federal and state grounds as parallel and equal in their scope. Exclusively federal grounds were advanced by defendant on appeal. Both the trial court and the lower appellate court resolved the issue on federal grounds only. The manner in which the federal issue was raised and preserved are outlined in detail in the petition for writ of certiorari, pp. 5-8.

[2] The prosecutor's concession likely was traceable to the holding of *Orozco v. Texas*, 394 U.S. 324 (1969). We are not inclined to agree that the setting and atmosphere had inherent within them the potential for coercion to which the *Miranda* decision was directed, and thus we do not agree that defendant was "in custody" within the spirit and meaning of *Miranda*. However, the prosecutor's concession and the *Orozco* decision largely foreclose examination of these points in this case.

'What do you know about the robbery?' must be suppressed. It would not be admissible because this man was not advised of his Miranda warnings, his Constitutional rights.

"However, the statement taken at the jail would be admissible because the evidence shows that there was no taint between the first statement 'I was there' and the second. I have not seen the contents of the second statement, but assuming that there is incrimination [sic] evidence, statements in that written document, that would be admissible.

"There was a break in the events from 45 to 50 minutes away from the courthouse and being transported by the police officer, and I think the taint — there's no showing of any taint whatsoever.

"There is a showing by the State that the statements were made freely and voluntarily. The rights card is in evidence. The officer read the rights to him. They are numbered one through seven. They appear on Exhibit #6, and on the reverse side is the question: 'Do you understand these rights?' And the word y-e-h appears after that, which I assume is yes. 'Do you have any questions about your rights?' Answer: 'No.' 'Having these rights in mind, do you wish to talk to us now?' And it says, 'Y-e-h, I do.'

"And I find that the State has established that the statement was given freely and voluntarily and knowingly and will not suppress Exhibit #5."

(J.A. 37-39).

Following his conviction, on appeal to the Oregon Court of Appeals, defendant relied on *Wong Sun v. United States*, 371 U.S. 471 (1963), *United States v. Bayer*, 331 U.S. 532 (1947) and state cases applying the federal "fruit of the poisonous tree" doctrine, to maintain

that his written confession was a tainted product of his pre-warning statement, and that the trial court's admission of the confession was error. The court of appeals agreed. It held that the giving of *Miranda* warnings, and defendant's valid waiver of rights were inadequate, as a matter of law, to attenuate the taint of the initial *Miranda* violation. The Oregon Supreme Court declined review of the court of appeals' decision. The state filed a petition for writ of certiorari in this Court seeking clarification as to whether and when a violation of the procedural rules of *Miranda v. Arizona*, *supra*, requires exclusion not only of statements made without the required warnings, but also of a subsequent confession obtained after full warnings and a valid waiver.

SUMMARY OF ARGUMENT

The issue for resolution in this case is when, if at all, a lawfully obtained confession made after full compliance with *Miranda* procedures must be suppressed as a "tainted" product of a prior *Miranda* violation. The issue has not been squarely addressed or decided in the prior decisions of this Court. In the "consecutive confession" context, this Court has considered only the admissibility of confessions which follow prior involuntary confessions. Here, however, the initial statement made by the defendant was fully voluntary; the only obstacle to its admissibility at trial was the failure of police to give *Miranda* warnings.

When a confession is challenged by an accused to be the product of a prior illegally obtained statement, the threshold inquiry properly is that of voluntariness. The test articulated in *United States v. Bayer*, 331 U.S. 352 (1947), is appropriate to determine the extent to which police conduct in obtaining an admission or confession directly infringes upon an accused's Fifth Amendment privilege against compulsory self-incrimination. That test focuses on whether the effect of the coercive circumstances that rendered a first statement inadmissible carried over to invalidate a subsequent confession as well. The fact that the first statement lets the "cat out of the bag" is not sufficient in and of itself to render a later confession inadmissible if the unlawful circumstances that invalidated the first confession have been fully removed.

Under this analysis, if an initial statement is inadmissible exclusively because police failed to follow *Miranda* procedures and not because the circumstances of the initial questioning suggest actual coercion, the careful giving of *Miranda* warnings before further questioning necessarily removes the prior illegality. The procedural defect is fully cured. It follows that, under a pure Fifth Amendment analysis, there is no constitutional justification for suppressing the voluntary post-warning confession.

A voluntariness inquiry alone, while an important prong of the analysis, does not fully address the special

concerns present when a first statement is obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The procedural requirements announced in the *Miranda* decision are safeguards intended to protect the Fifth Amendment privilege by counteracting compulsion inherent in custodial interrogation. Exclusion of a statement made without the prescribed procedures is the remedy fashioned to ensure future compliance with the *Miranda* warning requirement. Given the deterrence rationale of the *Miranda* decision, the exclusionary principle underlying the "fruit of the poisonous tree" doctrine properly may extend to derivative evidence of an initial *Miranda* violation. However, any such extension must be carefully tailored to the prophylactic objective. To ensure that the goal of deterrence is meaningfully advanced by exclusion, a causal link between the initial illegality and the subsequent evidence must be shown. But the mere fact that illegal police activity plays some part in the circumstances leading to later evidence does not suffice for suppression. In the final analysis, the cost of exclusion must be weighed against the constitutional principles affected. Because a *Miranda* violation involves only an infringement of the prophylactic standards designed to safeguard the Fifth Amendment privilege against self-incrimination rather than an abridgment of the privilege itself, the high cost of exclusion should be paid only where the extreme circumstances of a particular case require sup-

pression as a deterrent to further resort to such unlawful conduct. In the context of sequential confessions, this objective is met best by restricting suppression to cases of intentional exploitation of the prior illegality.

Only through conjecture and speculative inference does the present case demonstrate a causal nexus between the initial illegality and the subsequent confession. Defendant's initial admission did not "seal his fate" or place him at any significant psychological disadvantage, for it was too limited in its content. The record simply is bereft of any affirmative factual support for the conclusion that the existence of defendant's first statement caused him to give his later confession. Nevertheless, even if the "cat out of the bag" inference is sufficient here to establish the factual predicate of a poisoned-fruit analysis, suppression is unwarranted. The cost of excluding a reliable, voluntary confession in this case far exceeds any dubious deterrent value. There is no evidence of a willful or purposeful attempt to circumvent constitutional requirements in obtaining the confession. Application of the exclusionary rule under these circumstances would further Fifth Amendment rights only minimally, if at all, while severely limiting the authority of police officers to question suspects and to investigate criminal activity.

In sum, there is no constitutional justification for a *per se* rule that a statement made in custody by a person fully informed of his constitutional rights is inadmissible

if at some earlier time he made inculpatory remarks without the benefit of *Miranda* warnings. Voluntary statements made prior to advice of *Miranda* rights do not render subsequent voluntary statements after *Miranda* warnings inadmissible unless the subsequent statements are the product of intentional exploitation of the prior illegality by police. Because the subsequent statements in the present case were not the result of intentional exploitation of the prior statement, defendant's confession is admissible, and the decision of the Oregon Court of Appeals should be reversed.

ARGUMENT

The issue presented is when, if at all, a voluntary confession made after full advisal and waiver of constitutional rights is inadmissible as a tainted product of a statement made earlier to police without the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Thus presented, the issue is part of the broader question of the extent to which the prophylactic exclusionary principle of *Miranda* extends to derivative evidence, or "fruits," of a *Miranda* procedural violation.

In this case, defendant's initial limited admission that he was at the scene of the burglary was rendered inadmissible solely because the police had not given him *Miranda* warnings when the statement was made. Defendant made no claim below that his statement was involuntary or coerced, nor would the record support such an assertion. The police contacted the defendant in the

middle of the day in the familiar surroundings of his parents' home, with his mother nearby or present at all times. Although defendant was technically under arrest, he had not been confronted with this fact. His statement was in response to one or two questions or comments by the officer, made apparently as the officer attempted to explain why the police were there. Defendant was not subjected to lengthy questioning, nor did the officer pressure him to reveal details about the nature and extent of his involvement, if any, in the crime under investigation.

After defendant was driven to the police station, the police asked him if he was willing to give a statement. First, however, the officers fully advised defendant of his constitutional rights, including his right to remain silent, to have counsel present, and to have counsel appointed for him. Defendant intelligently and voluntarily chose to waive those rights, and he gave a detailed, two-page written statement outlining his involvement in the burglary. There is no suggestion in the record that defendant experienced or expressed any hesitation, uncertainty or unwillingness to talk to police either in making his initial admission or in deciding to give the written confession.

The Oregon Court of Appeals reached a constitutionally and logically untenable result in holding that defendant's written confession must be suppressed as a tainted product of the earlier failure to give *Miranda* warnings. The decision is analytically flawed. The lower

appellate court's erroneous course is charted, in large part, by a misreading and misapplication of the "cat out of the bag" reasoning of *United States v. Bayer*, 331 U.S. 532 (1947). The fact that an accused's resistance to remaining silent is lowered by the existence of a prior admission or confession was never intended, under the holding of *Bayer*, to be the test of whether a subsequent confession is inadmissible by virtue of a prior procedural illegality in obtaining the first statement. Nevertheless, the lower appellate court has elevated the "cat out of the bag" reasoning to the status of a *per se* rule of exclusion. The court's error is compounded by its unwillingness to distinguish between initial confessions that are involuntary in fact, and those that are inadmissible due to the failure of police to follow *Miranda* procedures.

If a voluntary confession given after full compliance with *Miranda* procedures is ever to be suppressed as a result of a prior *Miranda* violation, the basis for doing so must be found in constitutional principles of exclusion applicable to derivative evidence generally. The inquiry must focus on the extent of actual causation between the initial, illegally obtained admission and the later voluntary and lawfully acquired confession. Included in this analysis should be a principled assessment, made in light of the constitutional objectives of the *Miranda* decision, of the degree of attenuation brought about by subsequent full compliance with *Miranda* procedures. Further, the focus also should be on whether the police exploited the

initial illegality and whether the exclusion of derivative evidence will serve the policy of deterrence.

None of these inquiries is made or resolved in the Oregon Court of Appeals decision. Because they are not, the Oregon court reaches a wrong result which has the serious consequence of excluding reliable, lawfully acquired evidence without serving any constitutional objective. The issue presented by this case has never been squarely addressed in this Court. Its resolution provides this Court with an important opportunity to correct the decision of the Oregon Court of Appeals, and to give guidance to other courts.

I

In applying the test of admissibility announced in *United States v. Bayer*, initial confessions given under circumstances partaking of actual coercion must be distinguished from those which are inadmissible only because they involve *Miranda* violations. When this distinction is made, the conclusion necessarily follows that the giving of *Miranda* warnings removes the prior illegality and the subsequent confession is admissible.

The colorful "cat out of the bag" metaphor introduced into lawyers' vocabulary by Justice Jackson in *United States v. Bayer*, *supra*, is intended to describe the psychological disadvantage that an accused experiences when, after having previously been induced to confess, he

must decide whether to give a second confession. The metaphor suggests that an accused has less incentive to remain silent after he once has talked to police. The Oregon Court of Appeals' decision demonstrates the dangers inherent in reasoning by figure of speech. Legal metaphors are valuable tools to clarify, illustrate and persuade, so long as they are not permitted to become substitutes for analysis. Here, the metaphor was permitted to *be* the analysis. The court of appeals suppressed defendant's second confession solely on the basis that, at the time defendant gave his full confession to police, the "cat was out of the bag." This fact, the court of appeals concluded, was sufficient in and of itself to "taint" the second confession and render it inadmissible. A careful examination of the facts and the holding in *Bayer* reveals how fundamentally the court of appeals misapplied the "cat out of the bag" reasoning.

The defendant in *United States v. Bayer*, a soldier, was arrested, confined in a military psychopathic ward and denied, for an extended time, "callers, communication, comfort, and facilities" not detailed in the opinion. *Id.*, 331 U.S. at 539. He also was not charged or arraigned before a magistrate as required by federal law. Defendant gave a first confession after approximately one month of restraint under these circumstances. This confession was neither offered nor received at trial. Some six months after the first confession, defendant was questioned by FBI agents, who first advised him of his right to be silent.

Defendant was given his first confession to read. He then gave a second confession, labelled "supplementary," which was the same as the first, but more detailed. The lower federal court held that the second confession was "patently the fruit of the earlier one" and equally inadmissible, citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) and *Nardone v. United States*, 308 U.S. 338 (1939).

This Court reversed, holding that the "fruit of the poisonous tree" doctrine should not be applied to confessions. The opinion acknowledged that a causal nexus may exist between an induced initial confession and a subsequent confession by virtue of the psychological consequence of having once confessed. But the *Bayer* court disavowed that this causal link without more should render a subsequent confession unlawful:

> "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as the fruit of the first. *But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.* The *Silverthorne* and *Nardone* cases, relied on by the Court of Appeals, did not deal with confessions but with evidence of a quite different category and do not control this question."

United States v. Bayer, 331 U.S. at 540-541 (emphasis added).

The Court observed that when the accused gave his second confession, he was not under significant restraint and he had been fairly warned that his statement could be used against him. Citing *Lyons v. Oklahoma*, 322 U.S. 596 (1944), the Court held the second confession to be voluntary and therefore admissible. *United States v. Bayer*, 331 U.S. at 541.

The *Bayer* decision thus rejects, expressly, the "fruit of the poisonous tree" analysis in deciding the admissibility of confessions made after a previous involuntary confession. In doing so, the Court focuses on the distinction between confessions and inanimate derivative evidence, such as that at issue in *Silverthorne* and *Nardone*. As observed in the analogous area of statements or testimony given by third person witnesses:

> "The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. . . . [T]he living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence."

United States v. Ceccolini, 435 U.S. 268, 277 (1978) *quoting Smith v. United States*, 117 U.S. App. D.C. 1, 3-4, 324

F.2d 879, 881-882 (1963) (Burger, J.) *cert denied*, 377 U.S. 954 (1964).

The concern under the Fifth Amendment, always and only, is that an accused should not be forced to speak against his will. "Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be *compelled* to give evidence against himself." *Michigan v. Tucker*, 417 U.S. 433, 448 (1974) (emphasis original). A confession that is genuinely volitional, given because the accused chooses to give it, simply is not offensive to the Fifth Amendment. Thus, in the "consecutive confession" situation involving a prior involuntary confession, the Fifth Amendment interest to be protected is satisfied if the subsequent confession is shown to be voluntary. If the requisite showing is made, there is no constitutional justification for suppression of the confession.

The *Bayer* decision expressly rejects the notion that a voluntary confession should ever be suppressed solely on the basis that there a causal link between it and a prior involuntary confession. The presumed psychological and practical disadvantage caused by having previously confessed is not, in and of itself, an adequate basis to suppress a subsequent confession. The test is voluntariness. For a subsequent confession to be inadmissible, it too must be involuntarily elicited under coercive circumstances. The second confession thus must also be a poisoned tree. The

Bayer decision, in announcing this test, merely reaffirms what was held in *Lyons v. Oklahoma*, *supra*, where the Court recognized that the on-going effect of coercive practices may cause a non-conte_nporaneous confession to be involuntary as well.

> "Involuntary confessions, of course, may be given either simultaneously with or subsequently to unlawful pressures, force or threats. The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances. *Lisenba v. California*, 314 U.S. 219, 240."

Id. 322 U.S. at 602.

The *Bayer* analysis, applied to the circumstances here, provides no basis to suppress a *voluntary* confession given after police have fully complied with *Miranda* procedures. Where, as here, the only illegal condition rendering the first confession inadmissible is the lack of *Miranda* procedural safeguards, the illegality necessarily is removed when adequate *Miranda* warnings are given and the person questioned makes a valid waiver. No inference that a "coercive" practice has carried over to the non-contemporaneous statement fairly can be made. To conclude otherwise would be, in the words of the *Bayer* Court, perpetually to disable the accused from making an admissible confession. Nothing in the constitution or in the conscience of a civilized society compels that result.

The majority below attempted to disavow its *per se* rule of inadmissibility by declaring that a subsequent confession may be admissible if there is a "sufficient break in the stream of events" to insulate the later statement from the effect of what went before. In making this determination, the court of appeals identified lapse of time and change of circumstances as the most important considerations. (*See* Petition for Certiorari, App-3 - App-4).

Although the court of appeals' analysis is marked by several wrong turns, this is its single greatest deviation from the correct course. The suggestion that "lapse of time" and "change of circumstance" can remove the effect of the earlier *Miranda* violation is a *non sequitur*. Under *Bayer*, the focus is on the conditions that rendered the first confession unlawful and whether they carry over to render the second confession inadmissible as well. In the case of involuntary confessions, the concern is with revitalizing an accused's capacity for self-determination. Passage of time, change of surroundings and removal of an aggressive officer all logically bear on the suspect's ability to rest, reflect, reevaluate and otherwise restore his ability to exercise his will in choosing whether to speak. *See e.g., Clewis v. Texas*, 386 U.S. 707 (1967);

Westover v. United States, 384 U.S. 436 (1966).[3] But in the case of a failure to give *Miranda* warnings, it defies common sense to suggest that longer restraint, a change in location, or a change in questioning officers does anything to remove the initial illegality. Only an adequate advisal of the accused's constitutional rights, coupled with a valid waiver of those rights, will achieve this end. It is therefore crucial in applying the *Bayer* test of admissiblity that a distinction be made between confessions which are involuntary and those which are inadmissible only because *Miranda* procedures are not followed. The lower Oregon court's flat refusal to make that distinction is patently wrong.

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[3] *Westover v. United States*, 384 U.S. 436 (1966), one of the four cases decided in *Miranda v. Arizona*, demonstrates our point. Defendant's confession came after prolonged custody and intensive incommunicado interrogation initiated by state police. Some 14 hours after his arrest and after frequent interrogation by state police, defendant Westover was turned over to FBI agents for more questioning. Although the FBI advised defendant of his constitutional rights before he gave his confession, there was no articulated waiver of those rights. The *Miranda* court ruled that the waiver was invalid, although a different case might have been presented if defendant, when FBI took custody, were

> "removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them. But here the FBI interrogation was conducted immediately following the state interrogation in the same police station—in the same *compelling* surroundings. Thus, in obtaining a confession from Westover the federal authorities were the beneficiaries of the *pressure* applied by the local in-custody interrogation."

Id., 384 U.S. at 496-497. (Emphasis supplied).

There was no earlier confession in *Westover*, and thus no "cat out of the bag" effect to overcome by lapse of time or change of circumstance. Those considerations by the *Miranda* court, which are not ordinarily required as a precondition for a valid waiver, were suggested to be necessary to overcome the compulsion and pressure present in the *Westover* facts, not to somehow cure an earlier failure to give warnings.

Focusing on lapse of time and change of circumstances is equally illogical if, as the lower court holds, the objective is to dissipate the psychological effect of having made the prior confession rather than to dissipate the effect of the prior illegality. The decision in *United States v. Bayer*, as already demonstrated, of course does not establish this as the objective. To whatever extent a suspect in fact feels at a disadvantage by having previously confessed, he is never thereafter free of that feeling, as the *Bayer* opinion observes. That the "cat is out of the bag" is a given in the analysis. Nevertheless, the attenuating circumstances to which the court of appeals would look do nothing to counter whatever disadvantage a suspect senses. Moving the suspect to a new place for questioning, delaying further questioning for several days, and having a different officer ask the questions will not lessen the "cat out of the bag" impact of the prior statement. The suspect remains aware that he made the prior statement. If, as the court of appeals holds, *Miranda* warnings and a valid waiver are not sufficient to remove the prior illegality, then in fact the accused has been disabled forever from making a lawful confession. Thus, Judge Gillette, writing to concur in the result of the majority below, correctly observes that with the rule announced by the Oregon court, an accused who responds to pre-arrest (and we would add pre-warning) questioning is immunized from effectively waiving his

right to remain silent and voluntarily giving a statement to police. (*See* Petition for Certiorari, App-6).

In cases involving initial confessions inadmissible under *Miranda*, several lower federal court decisions have identified the proper analysis under *United States v. Bayer*, and the correct result. The test of admissibility for a subsequent confession is voluntariness. That a prior inadmissible confession lets the "cat out of the bag" is but one factor bearing on the disputed voluntariness issue. *Tanner v. Vincent*, 541 F.2d 932, 937 (2d Cir. 1976). This determination is primarily the responsibility of the trial court, whose decision on the basis of disputed facts is upheld unless clearly erroneous. *United States v. Schmidt*, 573 F.2d 1057, 1062 (9th Cir. 1978). *United States v. Toral*, 536 F.2d 893 (9th Cir. 1976) is on point:

> "[T]he proper inquiry is whether the conditions that rendered the pre-warning admissions inadmissible carried over to invalidate appellant's subsequent confession. . . . In the present case appellant's initial statements were rendered involuntary almost exclusively because of the failure of the police to give him the *Miranda* warnings. There was very little that was inherently coercive about the circumstances leading up to the admissions made by appellant either before or after the warnings were given. All of the questioning took place in the security of appellant's own home, . . . and the initial questioning, though improper, was in the form of preliminary questions that may have been asked of anyone in order to narrow the field of suspects. Unlike [the cases cited by appellant], the record before us

reveals no coercive atmosphere that was carried over after the *Miranda* warnings were given.

> "We do not suggest that the impact of the confession itself should be minimized. Under other circumstances, a prior *involuntary* confession standing alone may be enough to render involuntary a confession made after the *Miranda* warnings are given. In the circumstances of the present case, however, we cannot say that the impact of the prior statements was so great as to render appellant's confession involuntary."

536 F.2d at 896-897. (Citations omitted; emphasis added). To the same effect, *see Tanner v. Vincent*, *supra*; *United States v. Knight*, 395 F.2d 971, 973 (2d Cir. 1968); *Knott v. Howard*, 511 F.2d 1060, 1061 (1st Cir. 1975); *United States v. Shea*, 436 F.2d 740 (9th Cir. 1970); *United States v. Bowler*, 561 F.2d 1323 (9th Cir. 1977).[4]

Where an initial confession is excluded solely as a result of the failure to give *Miranda* warnings, the subsequent advisal of *Miranda* warnings and valid waiver of rights effectively remove the prior illegality. This result

[4] An appropriate case for contrast is *Evans v. United States*, 375 F.2d 355 (8th Cir. 1967). There, the defendant was detained in jail continuously for a period of two weeks and three days and, absent any warnings of his rights, was subjected to at least three interrogations by local officials. Although he repeatedly denied involvement in the crime under investigation, he finally confessed. He was a prisoner two weeks and six days before he was adequately advised of his rights by postal inspectors, who initiated more questioning and obtained a second confession. Defendant's first confession had fully revealed his involvement in the robbery and the officer to whom he gave the first confession was present at the time that postal inspectors resumed the questioning. The Eighth Circuit realistically appraised the total circumstances, and concluded that, like in *Westover*, federal authorities were the beneficiaries of pressure applied during the local, in-custody interrogation. The fact that defendant had *fully* revealed his involvement in the crime coupled with the circumstances of the initial interrogation, from which defendant had not effectively been removed, led to suppression of the second confession. 375 F.2d at 360-361.

should follow as a matter of law. The *Miranda* decision announces an objective test. The coercion which is deemed inherent in the objective circumstances of custody and questioning is further deemed adequately overcome when *Miranda* procedural safeguards are followed. For the limited purpose of requiring a warning procedure as a means of effectuating the Fifth Amendment, the *Miranda* decision presumes coercion whether or not, in a given case, coercion in fact exists. Just as the law is willing to make that presumption, the law must be willing to abandon it when the required procedures are followed. Although the privilege against self-incrimination has always been "as broad as the mischief" against which it seeks to guard, *see Councilman v. Hitchcock*, 142 U.S. 547, 562 (1892),[5] it should not be broadened beyond that mischief. That is, however, the consequence of the decision of the Oregon Court of Appeals which, on the basis of the initial *Miranda* violation, creates a rule of exclusion that extends far beyond the *Miranda* decision and its rationale.

II

There are sound justifications, provided by doctrinal developments since *United States v. Bayer*, to extend the "fruit of the poisonous tree" analysis to confessions that follow statements which are inadmissible under *Miranda*. Through a principled application of the derivative evidence

[5] Quoted with approval in *Miranda v. Arizona*, 384 U.S. at 459-460.

doctrine, however, the conclusion should be that *Miranda* warnings and a valid waiver adequately attenuate the initial illegality unless the extreme circumstances of a particular case require suppression as a deterrent to future unlawful conduct.

To the extent that the concern in a consecutive confession situation is to ensure the voluntariness of the later confession, the *Bayer* analysis, as applied by lower federal courts in cases such as *United States v. Toral*, *supra*, is correct and appropriate. However, doctrinal developments after the *Bayer* decision justify examination of whether *Bayer*'s rejection of a "fruit of the poisonous tree" analysis should be applied to consecutive confession situations in which the initial illegality is a *Miranda* violation.

Miranda v. Arizona, *supra*, decided 19 years after *United States v. Bayer*, marked a significant change in Fifth Amendment analysis. Before *Miranda*, the admissibility of a confession depended only on whether it was voluntary and the product of a free will. This determination called for a subjective inquiry into an accused's state of mind, based essentially on an examination of the circumstances of interrogation, to determine whether the processes were so unfair or unreasonable as to render a confession involuntary. *See* discussion and cases cited in *Michigan v. Tucker*, 417 U.S. 433, 441 (1974). With the *Miranda* decision, the privilege against self-incrimination for the first time was seen as the *principal* protection

for a person under arrest facing police interrogation. *Id.*, 417 U.S. at 442. More significantly, the Fifth Amendment was read to require that prophylactic safeguards be employed to protect against violations of the privilege. The *Miranda* Court fashioned the now-familiar set of warnings together with the requirement that a person in custody, before being questioned by police, execute a knowing and intelligent waiver of constitutional rights as procedural safeguards to protect the Fifth Amendment privilege. Statements obtained, whether inculpatory or exculpatory, as a result of custodial interrogation conducted without the *Miranda*-announced procedures were declared to be inadmissible. *See generally Miranda v. Arizona*, *supra*. Thus, although the Fifth Amendment has always directly forbidden the use of compelled testimony, the *Miranda* decision marked the point at which the Fifth Amendment was recognized to encompass an exclusionary rule designed to deter potential violations of the privilege as well as to vindicate actual violations.

The "fruit of the poisonous tree" doctrine developed as a means of effectuating Fourth Amendment guarantees by excluding evidence obtained derivatively as well as that obtained directly from an illegal search or seizure. *See Silverthorne Lumber Co. v. United States*, *supra*, and *Nardone v. United States*, *supra*. Given the deterrence rationale of the *Miranda* decision, suppression based on a failure to follow *Miranda* procedural safeguards is, in

principle, akin to exclusion of derivative evidence based on Fourth Amendment violations: the objective is not to remedy a direct infringement to the constitutional protection, but rather to prevent future infringements.[6] There is, therefore, no reason why, in a proper case, the exclusionary principle underlying the "fruit of the poisonous tree" doctrine should not extend to derivative evidence of an underlying *Miranda* violation, and this Court previously has so held. *Michigan v. Tucker*, *supra*, 417 U.S. at 446-447. But to state that proposition is to begin the analysis, rather than to end it. The important question for decision in this case is, as in *Michigan v.*

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[6] The distinction between suppression based on a pure Fifth Amendment analysis and one based on a Fourth Amendment exclusionary rule approach has been described in this way:

> "Under the fourth amendment, the essence of the constitutional wrong lies in the initial invasion of person or property; the exclusionary rule, as originally conceived, was a means of deterring this invasion. It is for this reason that the attenuation limitation arose in the fourth amendment context. As the causal chain between a wrongful act by the police and subsequent evidence becomes more attenuated, it becomes less likely that an intent to secure the evidence motivated the police action or that its exclusion would deter similar action in the future.
>
> On the other hand, the gravamen of a constitutional wrong under the fifth amendment is the use of a defendant's coerced testimony against him in a criminal proceeding, not the mere act of compelling him to speak; the fifth amendment exclusionary rule is an essential element of the constitutional right, not just a means of enforcing the right."

The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 222 (1968) (footnotes omitted).

Because *United States v. Bayer* involved only a pure Fifth Amendment claim of illegality and not a claim based on a violation of *Miranda* procedures, an exclusionary rule analysis was properly rejected by the *Bayer* Court.

Tucker, *supra*, 417 U.S. at 445, how sweeping the judicially imposed consequences of an initial *Miranda* violation shall be.

As a foundation to exclusion based on a "fruit of the poisonous tree" rationale, defendant must establish that a causal link actually exists between the initial illegality and the subsequent confession. *See Nardone v. United States*, *supra*. Exclusion then depends on whether the challenged derivative evidence has been obtained through exploitation of the illegality, such that suppression is likely to have a future deterrent effect. *See, e.g.*, *United States v. Calandra*, 414 U.S. 338 (1974). Prior decisions of this Court, in making the latter inquiry, have carefully focused on the constitutional interest infringed by the initial illegality, *see, e.g.*, *Brown v. Illinois*, 422 U.S. 590 (1975), the direct or indirect nature of the infringement, *Michigan v. Tucker*, *supra*, and the character of the fruit that is borne of the initial illegality, *see, e.g.*, *United States v. Ceccolini*, *supra*.

None of this Court's prior cases is directly on point. The Court has had before it cases involving post-warning confessions which were the product of initial violations rooted in the Fourth Amendment. *See, e.g.*, *Brown v. Illinois*, *supra*; *Dunaway v. New York*, 442 U.S. 200 (1979). It also has addressed application of the "fruit of the poisonous tree" doctrine in the context of derivative evidence consisting of the testimony of a third party

witness whom police would not have identified but for their use of information available due to a statement elicited in violation of *Miranda* procedures. *See, e.g., Michigan v. Tucker, supra.* This case is without precedent in this Court, however. It involves a novel combination of a "poisoned tree" that finds its roots in a statement inadmissible solely under *Miranda*, and a "fruit" consisting of a confession elicited after full compliance with *Miranda* procedures. As was the case when this Court decided *Michigan v. Tucker, supra*, the absence of precedent on point requires examination of the matter as a question of principle.

The foremost principle for guidance is that the exclusionary rule, whether applied to direct or derivative evidence obtained as a result of unconstitutional police conduct, is aimed at preventing future violations rather than punishing the police.

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."

Elkins v. United States, 364 U.S. 206, 217 (1960). *Accord United States v. Calandra, supra*, 414 U.S. at 347.

The rationale of the "fruit of the poisonous tree" doctrine assumes the existence of a causal connection between the initial illegality and subsequently acquired evidence. But the mere fact that illegal police activity

forms some link in the chain of circumstances that leads to evidence is insufficient to justify exclusion.

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)."

Wong Sun v. United States, supra, 371 U.S. at 487-488.

This Court therefore has cautioned that although "sophisticated argument" may prove a causal connection, the connection may, as a matter of good sense, have become so attenuated as to dissipate the taint. *Nardone v. United States, supra*, 308 U.S. at 341. The issue cannot be decided on the basis of causation in the logical sense alone, or through the sort of analysis applicable in the physical sciences. *United States v. Ceccolini, supra*, 435 U.S. at 276. Rather, the cost of exclusion must be weighed against the constitutional principles to be protected, and application of the "fruit of the poisonous tree" doctrine must be restricted to those areas where the remedial objectives of the exclusionary rule are most efficaciously served. *United States v. Ceccolini, supra*, 435 U.S. at 275, 279; *United States v. Calandra, supra*, 414 U.S. at 348.

A. The record in this case does not establish a causal nexus between the initial illegality and the subsequent confession.

Even though simple "but for" causation is not an adequate basis for exclusion of derivative evidence, factual causation is nevertheless an essential predicate for invoking the exclusionary rule. The existence of the necessary causal link may, in some cases, be undisputed. *See, e.g., Michigan v. Tucker, supra*, 417 U.S. at 433 (government stipulation). Under certain facts, the causal link may be self-proving or reasonably beyond dispute. *See, e.g., Commonwealth v. White*, 374 Mass. 132, 371 N.E.2d 777 (1977) *affirmed without opinion by an equally divided court*, 439 U.S. 280 (1978) (information acquired from inadmissible confession used to obtain search warrant) and *Harrison v. United States*, 392 U.S. 219 (1968) (only reasonable inference was that defendant took stand and made testimonial admissions to rebut prosecution's use of the erroneously admitted confessions). In all other cases, if a defendant desires to suppress evidence as the "tainted" product of an earlier illegality, defendant must establish the factual nexus between the two. *See Nardone v. United States, supra*, 308 U.S. at 342; *Alderman v. United States*, 394 U.S. 165, 183 (1969); *Fahy v. Connecticut*, 375 U.S. 85, 91 (1963).

The only basis for concluding in this case that there is any factual link between the initial *Miranda* violation and defendant's post-warning confession lies in the

inference that defendant gave the second confession because his first statement let the "cat out of the bag." That inference is, however, a particularly weak one under the facts presented.

First, given the contents of defendant's two statements, it simply is not logical to draw that inference. Defendant's initial admission ("I was there") merely placed him at the scene of the crime. In striking contrast to this limited admission, defendant's post-warning written confession, which was two pages in length, described in great detail how defendant participated in the burglary, whom he assisted, and what he was paid for his assistance. To suggest that defendant's limited initial statement "sealed his fate" and placed him at the psychological disadvantage of having told police all or even most of what there was to tell, strains both imagination and belief. Defendant, significantly, did not take the stand to so testify. But even if he had done so, the trial judge, relying on learning, good sense and common experience, would have been well justified to disbelieve him.

To draw an inference of a causal nexus based on the "cat out of the bag" reasoning of *United States v. Bayer, supra*, is unwarranted for a second reason. The logic of that reasoning is substantially diluted where, as here, an initial confession is inadmissible solely because of a *Miranda* procedural violation, not because it was given under circumstances suggesting elements of compulsion.

Judge Friendly recognized this in *United States v. Gorman*, 355 F.2d 151 (2d Cir. 1965), a case which preceded *Miranda v. Arizona*, *supra*, but which involved analogous facts. There, the defendant made a voluntary and limited statement that was inadmissible because of a failure to provide warnings mandated by federal statute. He was later properly advised of his rights, and he gave a full confession. In rejecting an argument that the second confession should be suppressed as a product of the first, Judge Friendly reasoned:

> "[T]he district judge was warranted in finding the detailed statement to Agent Wickman not to have been so causally related to the brief admission of guilt to Detective Cuomo as to vitiated by infirmity in the latter, if infirmity there was. Gorman's case is quite different from the situation in which, after a first confession has been extracted from a man previously professing innocence by means calculated to break his will, a second confession is more politely secured. In such a case, there is a strong basis both in logic and in policy for drawing the inference that the second confession was the product of the first, and for permitting that inference to be overcome only by such insulation as the advice of counsel or the lapse of a long period of time, cf. United States v. Bayer, . . . Gorman's admission to Detective Cuomo was made spontaneously and without pressure, and its causal relation to his subsequent detailed confession is tenuous at best."

Id. at 157 (citations omitted).

The above reasoning applies equally here. As *Michigan v. Tucker*, *supra*, recognizes, a statement may be may voluntary under traditional standards even if it is inadmissible due to a failure of police to provide *Miranda* warnings. *Id.*, 417 U.S. at 444-446. Unlike a suspect who maintains innocence or lack of knowledge and who is forced against his will to confess, a person who speaks voluntarily does not have it in mind to keep the "cat in the bag." In that circumstance, a later confession given after adequate advice of the right to remain silent is at least as likely, if not more likely, to be motivated by a continued willingness to talk to police than to be a product of an inner sense of futility. The "cat out of the bag" reasoning of *United States v. Bayer*, when applied to cases involving voluntary confessions rendered unlawful only due to a *Miranda* violation, simply proves too much.[7]

B. The cost of excluding defendant's post-warning voluntary confession is not justified because exclusion would not meaningfully advance the interests protected by the Fifth Amendment.

If the "cat out of the bag" inference is considered adequate here to establish the necessary cause-in-fact

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[7] Although *United States v. Bayer*, preceded the *Miranda* decision and thus did not consider the force of its logic to instances where, as here, the first confession was given under circumstances totally lacking coercion or duress, we think it is of some significance that the *Bayer* court expressly directed its observations to confessions that are a product of inducement:

> "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the *inducement*, he is never thereafter free of the psychological and practical disadvantages of having confessed."

331 U.S. at 540 (emphasis added).

predicate of a "fruit of the poisonous tree" analysis, the question remains whether suppression of defendant's confession adequately will advance the constitutional interest infringed. Courts that have wrestled with the problem in the related area of *Miranda* violations leading to the discovery of tangible evidence have expressed concern that the admission of such "fruits" would "in effect, sanction the initial violation of constitutional rights" and cause those violations to escape appellate review. *See, e.g., Commonwealth v. White, supra*, 371 N.E.2d at 781. *Accord, State v. Preston*, 411 A.2d 402, 407 (Me. 1980). Although that concern must be addressed, the focus nevertheless is not on penalizing past violations, but on preventing violations in the future. Thus, as observed by the Maine court in *State v. Preston, id.* at 407-408, because of the importance of the deterrence rationale, the prophylactic effect of exclusion on police practice is critical in deciding how far to extend the exclusionary rule to evidence obtained as a result of a *Miranda* violation.

The only constitutional interest at all implicated by the initial illegality here is defendant's Fifth Amendment privilege against self-incrimination. The analysis under *United States v. Bayer, supra*, with its focus on the voluntariness of a subsequent confession, is adequate to determine the extent to which that constitutional interest is directly infringed in any given instance. Realisically assessed, the facts of this case admit of no other conclusion than that defendant's initial statement was purely voluntary, a product of defendant's free choice rather than of inducement or coercion by police. The only illegality that infected his initial statement—*i.e.*, the lack of *Miranda* warnings and a valid waiver—was fully removed at the time of his subsequent confession. The time, place and manner of the police questioning surrounding his subsequent statement are adequate to demonstrate that his confession was knowingly, intelligently and voluntarily made, as the trial court expressly found. Under these facts, there simply is nothing directly offensive to the Fifth Amendment's concern that an accused not be compelled to incriminate himself.

This case thus involves an initial illegality like that in *Michigan v. Tucker, supra*. As this Court observed there, the failure of law enforcement officers to follow *Miranda* procedures does not directly infringe upon the Fifth Amendment protection against compulsory self-incrimination. Rather, such an omission violates only the prophylactic rules developed to protect the Fifth Amendment right. *Id.*, 417 U.S. at 439. Where circumstances surrounding a pre-warning admission or confession strongly indicate that an accused has not been deprived of his privilege against self-incrimination as such, but has only been denied procedural safeguards associated with that right, the constitutional interest to

be advanced by exclusion is substantially diluted. The real objective in applying a rule of exclusion to "fruits" of a *Miranda* violation is not to deter coercive police practices *per se*. It is, instead, to deter failures to follow *Miranda* procedures which, in turn, are designed to safeguard against coercion. A "fruit of the poisonous tree" analysis, when applied to *Miranda* violations, thus creates a second generation exclusionary rule. Because we are all the further away from applying the medicament to the evil it was designed to cure, that medicament should be all the more cautiously taken.[8]

Because the rationale of the exclusionary rule under the "fruit of the poisonous tree" doctrine is deterrence, this Court's prior decisions carefully have considered the existence of flagrancy or wilfullness in the illegality and other factors suggesting that police deliberately attempted to circumvent constitutional requirements. *See, e.g., Michigan v. Tucker, supra*, 417 U.S. at 447-448; *Brown v. Illinois, supra*, 422 U.S. at 402-404. Here, evidence of purposefulness or willfulness is wholly lacking. Officer Burke's failure to advise defendant of his rights at

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[8] We borrow from Professor Amsterdam's frequently quoted observation on the need to serve the deterrent purpose of the exclusionary rule in its application:

> "As it serves this function, the rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease."

Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 389 (1964).

worst appears to have resulted from inadvertence. More likely, it was a consequence of the difficulties that law enforcement officers encounter as the *Miranda* doctrine encroaches ever further into law enforcement activities in the field. "Custody," as that term was used in *Miranda v. Arizona*, was designed to capture in concept the type of restraint that law enforcement officers exercise most typically after arrest and transportation of a suspect to a police station, where the suspect frequently is held incommunicado, "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." 435 U.S. at 456.

Here the officer's state of mind created a type of anticipatory custody, rather than custody in fact. In actuality, no restraint had yet been exercised over defendant; he remained in his home with family nearby, the setting was casual and relaxed. Lower courts continue to struggle over the question of what, for purposes of triggering *Miranda* procedural requirements, constitutes "custody" outside of police station interrogation of suspects under arrest. *See, e.g.*, Petition for Certiorari, *Oregon v. Roberti*, (No. 82-315), Brief for Petitioner, *Berkermer v. McCarty*, (No. 83-710). In an area where legal practitioners have considerable difficulty in articulating and agreeing on the legal standards, it should come as no surprise that law enforcement officers have frequent difficulty in applying them. But as stated in *Michigan v. Tucker, supra*:

> "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic."

417 U.S. at 446.

In any event, whether the officer's error stemmed from the practical difficulties of applying the *Miranda* doctrine or from simple inadvertence, there is certainly nothing to suggest that the omission of warnings was purposeful. If the officer had intended to create a "cat out of the bag" effect by eliciting a confession from defendant before giving warnings, it can be reasonably expected that the officer would have pursued the matter further. At the very least, when defendant stated "I was there" the officer likely would have asked defendant who else was there, what was taken, and so on. Or, if the officer had intended to exploit defendant's earlier admission when he advised defendant of his *Miranda* rights and obtained a full confession from defendant, the officer likely would have confronted defendant with that admission at the police station, in an attempt to suggest, overtly or subtly, that having admitted his presence at the scene of the burglary, defendant might as well give the police a full account of his involvement in the crime. The police did neither of these things in this case.

Thus, the most striking feature of the Oregon Court of Appeals' decision is that an altogether voluntary confes-

sion, made after full compliance with *Miranda* procedures, is suppressed in a circumstance where there is nothing particularly offensive about the illegal police conduct, and where there is no evidence whatsoever that police exploited, used or took advantage of the prior illegality in any way.

All of this points to a concern that significantly distinguishes this case from those involving tangible or inanimate evidentiary fruits. A defendant's decision, after adequate advice of rights and a waiver of those rights, to speak under facts such as those presented here is a product of individual personality and motivation. The simple reality is that our ability accurately to predict human behavior is limited, and accordingly there are limits on the extent to which we should hold police accountable for the internal reactions of those whom they question. As already demonstrated, the "causal link" between the prior admission and the subsequent confession is at best speculative and tenuous. That link may in fact be only one of many in the chain of causation. Human conduct is individualized by personality, and it is fueled by a vast range of subjective choices and concerns. A suspect's decision to confess may stem from anxiety, remorse, a hope for lenient treatment, a lack of concern about consequences, or from any number of other reasons or combination of reasons. The greater likelihood is that in any given case, there is no single motivating factor such that it can be predicted with reliability that

removal of that factor would lead to a different decision on a suspect's part.

For many of these reasons, in the analogous area of testimony by third party witnesses who are discovered as a result of some prior illegality, this Court has held that the exclusionary rule should be invoked with much greater reluctance. Where the claim is based on a causal relationship between a constitutional violation and the statements made thereafter by a live human being, the causal predicate of the "fruit of the poisonous tree" doctrine admits of more uncertainty than when a similar claim is advanced to support suppression of an inanimate object. *See generally United States v. Ceccolini, supra.* Similar caution should be exercised here.

On the whole, the decisions of this Court reflect a policy that genuinely voluntary statements, so long as otherwise trustworthy and relevant, should not be suppressed unless strong countervailing policies exist. Under a "fruit of the poisonous tree" analysis, discussions of causation, attenuation, and "taint" sometimes distract from the more essential inquiry: will the interest protected by the Constitution be sufficiently advanced by exclusion to justify the serious cost of such a penalty? Here, it must be concluded that the cost of exclusion is too great. As previously demonstrated, the effect of holding defendant's post-warning confession inadmissible is to disable a suspect permanently from giving a usable confession once a *Miranda* violation has occurred, no matter how voluntarily and freely the confession is given.

Against that cost, which is an extremely high one, *see United States v. Ceccolini, supra,* 435 U.S. at 278-279, must be balanced the mere departure from the prophylactic standards of *Miranda* and the likelihood that, because of the complete absence of purposefulness or exploitation on the part of police, no deterrent purpose will be served. When these factors are placed on the scales, the balance swings decidedly in favor of admitting the challenged confession.

Because there is no abridgment of the Fifth Amendment privilege against compulsory self-incrimination in cases such as this, it may be that the balance will nearly always fall to the side of admitting a voluntary confession made after full compliance with *Miranda* procedures. Indeed, the suggestion of this Court in other cases has been that where the prior illegality does not implicate Fourth Amendment concerns or directly infringe on the privilege against compulsory self-incrimination, substantially less is needed to "attenuate the taint"; the giving of *Miranda* warnings will often be adequate for this purpose. *See Brown v. Illinois, supra,* 422 U.S. at 601-603; *Michigan v. Tucker, supra,* 417 U.S. at 448-450. We do not advocate a *per se* rule of admissibility, however, although such a rule might have considerable merit for its ease of application and its frequently correct result. *See United States v. Ceccolini, supra,* 435 U.S. 281-285 (Burger, C.J., concurring). It is at least conceivable that a case may arise where

the prior *Miranda* violation is flagrant and egregious, where police plainly exploit the prior illegality by taking an active hand in suggesting to defendant that the "cat is out of the bag," and where police unquestionably have attempted to circumvent the dictates of *Miranda v. Arizona*. If such a case ever arises, the courts should be prepared to address it and to deter such conduct in the future. This is not such a case.

In sum, this is not a case in which the police wilfully disregarded the requirements of *Miranda* or even attempted to capitalize upon the fact that defendant was not advised of his *Miranda* rights the moment he was taken into custody. It is not a case in which the police exploited defendant's voluntary admission, at the time he was arrested, that he had been present at the scene of the burglary, either by asking him to elaborate upon it then and there, or by reminding him of the admission later at the police station, after advising him of his *Miranda* rights. It is not even a case in which a causal connection has been demonstrated between defendant's admission that he "was there" at the burglary scene and his subsequent written confession detailing his involvement in the burglary. The *post hoc, ergo propter hoc* reasoning of the Oregon Court of Appeals to the contrary is fallacious.

CONCLUSION

Justice Oliver Wendell Holmes once wrote:

> "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."[9]

---

[9] *Hyde v. United States*, 225 U.S. 347, 391 (1912) (dissenting opinion).

The lower Oregon appellate courts' fascination with the "cat out of the bag" metaphor is understandable, even if not excusable. But it results in an analysis that departs sharply from principle, and leads to a seriously wrong result. Whether the analysis is made under a pure Fifth Amendment approach such as that employed by *United States v. Bayer*, or whether, because this case involves a *Miranda* violation rather than a direct infringement of the Fifth Amendment, a "fruit of the poisonous tree" approach is taken, the challenged confession properly should be admitted. The Oregon Court of Appeals erred in concluding otherwise, and the judgment of the lower court should be reversed and remanded.

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No. 83-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OREGON,

Petitioner,

v.

MICHAEL JAMES ELSTAD,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF OREGON

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Does the Self-Incrimination Clause of the Fifth Amendment require the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier admission from the defendant without advising him of his rights, even though the trial court found that the earlier admission was otherwise voluntary, and that it did not "taint" the subsequent confession?

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. James E. Mountain, Jr., Solicitor General of the State of Oregon, Counsel for Petitioner, hereinafter called "State", and Gary D. Babcock, Public Defender, Counsel for Respondent, hereinafter called "defendant". Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. (AELE), as a national not-for-profit citizens organization is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* fifty-seven times in the Supreme Court of the United States, and thirty-three times in other courts, including the U.S. District and Courts of Appeals and the Supreme Courts of California, Illinois, Ohio and Missouri.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. (IACP) is the largest organization of police executives and administrators in the world, consisting of more than 14,000 members in 75 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to improve the delivery of vital police services, while at the same time protecting the rights of all citizens.

THE LEGAL FOUNDATION OF AMERICA (LFA) is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

Amici's specific interest in the instant case arises from our concern that this Court's approval of the decision of the Oregon

Court of Appeals would establish an intolerable rule of law that would implicitly require infallibility on the part of the police by denying them the opportunity of rectifying an error of omission on their part with respect to the *Miranda* decision.

STATEMENT

Two police officers went to the residence of defendant Elstad's parents with a warrant for his arrest in connection with a burglary. After being admitted to defendant's home by his mother and directed to his bedroom where they waited for him to dress, he was taken to the living room by one of the officers while the other one went to the kitchen with defendant's mother. The officer sat down with defendant on a sofa and asked him if he knew why the officers were there. Defendant said he did not. The officer inquired whether defendant knew the victim of the crime. Defendant said he did. Defendant also said that he had heard about the crime. The officer replied that he thought defendant was involved in the burglary, and asked defendant what he knew about it. Defendant responded, "I was there." The officer did not ask any further questions of defendant at that time, nor did he otherwise attempt to clarify the nature or extent of defendant's participation in the crime, if any.

Defendant was then taken to a police station, where he was advised of his rights by a reading from a standard *Miranda* rights card. This was administered by one of the two officers who went to the defendant's home to arrest him, but not by the one who interviewed him. The officer asked defendant if he understood the rights, and defendant answered affirmatively, signed the *Miranda* waiver card, and gave a written confession.

No threats or promises were made to defendant either at his home or at the police station when defendant gave his statement. The trial court found, in denying defendant's

motion to suppress the written confession, that the confession was freely and voluntarily given. The trial court also found that the pre-*Miranda* warning admission did not taint the subsequent confession.

The Oregon Court of Appeals held that the trial court erred in refusing to suppress defendant's written confession. The court concluded, as a matter of law, that the police action in obtaining an admission from defendant in violation of *Miranda* exerted a coercive impact on defendant's later confession, despite the fact that the subsequent confession was preceded by *Miranda* advice and a waiver of rights. *State* v. *Elstad,* 61 Or. App. 673, 678, 658 P.2d 552, 555.

SUMMARY OF ARGUMENT

The summary of argument has already been submitted in the "argument" section of the Table of Contents and in *Amici's* statement of interest.

ARGUMENT

The opportunity for the interrogation of persons suspected of crime is indispensible in many criminal investigations. To deprive the police of that opportunity would produce intolerable consequences. The Oregon court's rule would foreclose that opportunity in cases where the police committed an error of omission with respect to the particular stage of an investigation when the *Miranda* warnings are required. This is compounded by the fact that the courts themselves have experienced difficulty in determining the point at which "custody" begins for *Miranda* warning purposes. This has also been true with regard to the issue as to what constitutes "interrogation."

A recent example of both points is the case of *United States* v. *Mesa,* 638 F.2d 582 (3rd Cir. 1980). This was a case where a person for whom the FBI had an arrest warrant on a charge of shooting both his common law wife and his daughter had barricaded himself, while armed, in a motel room. An FBI agent called to him repeatedly on a bullhorn, urging him to come out. He refused, but agreed to talk on a mobile phone to an FBI negotiator. Their conversation was recorded and in it the suspect made some incriminating statements, after which he peacefully surrendered. A United States district court suppressed the statements on the ground that they were made in a custodial situation, without the suspect having received the *Miranda* warnings. On appeal the circuit court reversed in a 2 to 1 decision. The chief judge concluded that "where an armed suspect who possibly has hostages barricades himself away from the police, he is not in custody [within] the meaning of the *Miranda* rule." Another judge concluded that the FBI agent's conversation with the suspect did not constitute interrogation, and for that reason the warnings were not required. The third judge dissented because he concluded that there was both custody and interrogation, thus necessitating the warnings. (Another recent example of the confusion that prevails is *United States* v. *Bautista,* 684 F.2d 1286 (9th Cir. 1982).)

In the Oregon case the officers probably assumed that there was no custody at the time of the interview in defendant's home and consequently the warnings were not required at that time, although at trial the prosecution conceded that the warnings were necessary. In any event, there was at most an error of omission by officers perhaps not learned in the law. Even if they were well informed, they still may have been confused, as exemplified by the foregoing federal circuit court of appeals case, *United States* v. *Mesa.*

Even assuming that the warnings were required at the time of the defendant's questioning in his home, the fact remains that he later on did receive the warnings while in the police station, prior to the confession he made there. Whatever taint may have attached to the statement in the home was, we suggest, dissipated by the warnings prior to the police station confession.

Over the years, the courts, both state and federal, have held that even when coercive interrogation methods had been used, there was still a possibility of obtaining a legally valid confession later on by properly interrogating the subject under different conditions and circumstances than those which prevailed originally. (The cases are cited in Inbau & Reid, "Criminal Interrogation and Confessions" (2nd ed 1967) 201.) This Court itself, a number of years ago, held to that effect in cases which involved both state and federal prosecutions, despite the Court's "civilized standards" (McNabb-Mallory) concept of confession admissibility in the federal courts which prevailed at that time, and despite the fact that the initial confession in the state case was a coerced one. *United States* v. *Bayer,* 331 U.S. 532 (1947); *Lyons* v. *Oklahoma,* 322 U.S. 596 (1944).

In all of the earlier cases involving this problem the courts said that a presumption exists that the influence of the first improper interrogation was a continuing one. The prosecution, therefore, had the burden of proving that when the suspect confessed later on he was no longer dominated or affected by

the influence of the earlier improper interrogation practices. Moreover, the courts demanded a very high degree of proof to offset the presumption that prevails in favor of the accused.

Amici are not suggesting that the above stated law in cases involving coercion has viability at the present time, nor are we urging that view upon the court in this case where there was no element of coercion. We do urge, however, that if there has been and perhaps continues to be any basis for allowing corrective measures to be taken to salvage a confession of guilt when a coercive practice was used, there should be no reluctance to sanctioning corrective measures with respect to a *Miranda*-flawed confession which does not involve the risk of the acceptance of a confession from an innocent person. Furthermore, there is no need in the latter type of case for a change of interrogation personnel or surrounding circumstances at the time of the second, post-*Miranda* confession. Without the factor of coercion initially, there is no need for insistence upon new personnel or different circumstances at the time of the second confession.

Several federal circuit courts of appeal have had no difficulty in concluding that the proper giving of *Miranda* warnings removes the taint in cases where there has been no police coercion involved in the prior confession or admission, and where the only illegality has been the failure to give the *Miranda* warnings before the first inculpatory statement, *Knott* v. *Howard,* 511 F.2d 1060 (1st Cir. 1975); *United States* v. *Knight,* 395 F.2d 971 (2nd Cir. 1968); *United States* v. *Toral,* 536 F.2d 893 (9th Cir. 1976).

Finally, we suggest that the Court give consideration to two of its decisions which we feel have relevance to the issue in the present case. One is *Harris* v. *New York,* 401 U.S. 222 (1971), holding that a *Miranda*-flawed confession may be used for impeachment purposes. The other is *Michigan* v. *Tucker,* 417 U.S. 433 (1974), permitting derivative use to be made of a confession flawed by the omission from the warnings given the defendant that he was entitled to counsel free of charge.

CONCLUSION

The Oregon appellate court case now before this Court is one of many hundreds that have been spawned by *Miranda*. They have consumed enormous time, effort, and expenditure of funds that could have been put to far better use on matters of considerably greater importance within the judicial system. If this Court were to sustain the Oregon court ruling, it would be akin to sprinkling kerosene on the embers of a fire that never should have been started in the first place.

Not only is it to the best public interest to reject the rule established below in this case, but we recommend, additionally, that at the earliest opportunity this Court should re-examine the *Miranda* mandate as to the justification for its continued existence. (An expanded explanation for this recommendation is presented in Inbau, "Over-Reaction: The Mischief of *Miranda* v. *Arizona*," 73 J. C. L. & Crim. 797-810 (1983).)

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether respondent's voluntary and otherwise admissible confession must be excluded from evidence on the ground that it was the product of a prior voluntary statement by respondent that is inadmissible under *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

In this case a criminal defendant voluntarily made two successive inculpatory statements. Because the first statement was made under conditions that, according to a concession by the State, rendered it inadmissible under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the court below ordered the suppression of the second statement as well. This Court's analysis and resolution of the question whether the second statement is admissible is likely to have a significant effect on the admissibility of voluntary statements, and perhaps other evidence allegedly derived from a violation of *Miranda*, in federal criminal prosecutions.

STATEMENT

Two police officers went to respondent's residence during the afternoon and were met at the door by respondent's mother. When they asked to see respondent, she directed them to a bedroom where respondent was resting. One officer went to the kitchen of the home with respondent's mother, while the other asked respondent to dress and then accompanied him to the living room. Respondent's mother was told that the officers had a warrant to arrest respondent on a charge of burglary, but respondent was not told that the officers had a warrant or that he was under arrest. Pet. App. 2; J.A. 9, 18-20, 27-28.

In the living room, the officer asked respondent if he was aware why the officers were there. Respondent said he was not. The officer then asked respondent if he knew a Mr. Gross. Respondent replied in the affirmative and added that he had heard of a "robbery" at the Gross residence. The officer then suggested to respondent that he believed respondent may have been involved in the burglary, and respondent replied: "I was there." Pet. App. 2; J.A. 19-20, 28-29.

Respondent was then transported to the stationhouse. The trip took approximately one hour because the arresting officers were diverted to answer another call, and a different officer completed the journey with respondent. At the stationhouse, respondent was, for the first time, given the warnings specified by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Respondent completed and signed a written form that had the *Miranda* warnings printed on it; he acknowledged in writing that he understood his rights and wished to discuss the crime with the police. He then gave the arresting officers a full written confession (J.A. 40-42) that detailed his role in the burglary. Pet. App. 2; J.A. 10-14, 21-23, 32-33, 38.

The State did not seek to use at trial the statement respondent made at his home. The trial court, after a hearing, denied respondent's motion to suppress the subsequent written confession. The court first remarked that in its view the statement given at respondent's home would have been inadmissible because it was not preceded by *Miranda* warnings. But the court explained that the subsequent statement was admissible for the following reasons (J.A. 37-38):

> [T]he evidence shows that there was no taint between the first statement "I was there" and the second. * * *
>
> There was a break in the events * * * and I think the taint—there's no showing of any taint whatsoever.
>
> There is a showing by the State that the statements were made freely and voluntarily.

After a trial without a jury, respondent was convicted of first-degree burglary. He was sentenced to no more than five years' imprisonment and required to make restitution (J.A. 48).

The Oregon Court of Appeals reversed (Pet. App. 1-6). It noted that the State conceded that respondent's first statement was inadmissible, and stated (*id.* at 3): "Our inquiry here is whether there was a sufficient break in the stream of events between that inadmissible statement and the written confession to insulate the latter statement from the effect of what went before." The court acknowledged that "the absence of actual compulsion * * * may be a factor in the analysis of the 'total circumstances of each case' that we must make in these successive interrogation cases" (*id.* at 4 (citation omitted)), but it ruled that this was not "a factor of sufficient significance" to render the second statement admissible (*id.* at 3-4). The court reasoned as follows (*id.* at 4):

> Regardless of the absence of actual compulsion, the coercive impact of the unconstitutionally obtained statement remains, because in a defendant's mind it has sealed his fate. It is this impact that must be dissipated in order to make a subsequent confession admissible. In determining whether it has been dissipated, lapse of time and change of place from the original surroundings are the most important considerations. See *Westover v. United States*, 384 US 436, 496 * * * (1966).

The Court of Appeals then noted that respondent "remained in custody without an opportunity to consult an attorney" after he made the first statement, and that "the same two officers who had elicited the original confessions were present at the subsequent interrogation" (Pet. App. 4). For these reasons, the court stated, it did not "find the absence of actual threats and compulsion sufficient" to warrant admitting the second statement into evidence (*ibid.*).

The Court of Appeals also rejected the State's argument that respondent's first statement revealed so little incriminating information that it could not be viewed as the cause of the second statement, which was far more inculpatory. The court explained (Pet. App. 5): "[The first] statement may not literally have admitted complicity in the burglary, but given the manner in which the questioning officer put the inquiry * * * [it] was significantly incriminatory. The cat was sufficiently out of the bag to exert a coercive impact on [respondent's] later admissions."

A concurring judge joined the court's opinion because he believed the case was controlled by state law precedents but expressed his regret that the "metaphor [of 'the cat is out of the bag'] now rules where analysis was once sovereign" (Pet. App. 5).

The Oregon Supreme Court denied a petition for review without opinion (Pet. App. 7).

SUMMARY OF ARGUMENT

The opinion of the Oregon Court of Appeals suggests three possible bases for ordering the suppression of respondent's written confession. We submit that none of them justifies that result.

A. It is plain that neither of respondent's statements was actually "compelled" within the meaning of the Self-Incrimination Clause of the Fifth Amendment. The officers used no threatening or oppressive tactics at any time. The Court of Appeals' suggestion that respondent's first statement coerced his second statement by letting "the cat out of the bag" reflects a misunderstanding of the notion of coercion: when a suspect makes a voluntary statement because the authorities have confronted him with incriminating evidence, that statement may be subject to suppression for some reason, but it is not correct to say that it has been coerced.

B. The Court of Appeals also suggested that respondent's second statement was inadmissible, even though it was obtained following a waiver of *Miranda* rights, because the prior questioning at respondent's residence—questioning that, the State conceded, did not comply with *Miranda*—undermined respondent's capacity to give a subsequent valid waiver of his *Miranda* rights. We doubt that the State's concession was sound; we believe that respondent, who was not told he was under arrest, was not "in custody" within the meaning of *Miranda* when he was questioned at his residence. See *Beckwith* v. *United States*, 425 U.S. 341 (1976). But assuming that respondent was "in custody" when he made his first statement, the most that can be said is that the questioning constituted a borderline violation of *Miranda*. This was

not remotely sufficient to cause respondent not to comprehend the meaning of his *Miranda* warnings when he did receive them, or to impair his ability to make a fully voluntary decision whether to invoke his rights.

C. The most likely explanation of the court of appeals' decision is that the court considered respondent's second statement to be derived from—that is, to be a "fruit" of—the prior, inadmissible statement. This Court has not resolved the question whether evidence derived from statements that are inadmissible under *Miranda* should ever be suppressed, and we have taken the position that the *Miranda* exclusionary rule should be confined to the statement obtained without proper warnings and should not extend to any fruits of such a statement. But it is unnecessary for the Court to resolve that broad question here, because there are narrower grounds for holding respondent's written confession admissible.

To begin with, respondent's written confession cannot be a suppressible "fruit" unless it was the causal product of his earlier remark, and the trial court appears to have been correct in its determination that the first statement did not produce the second. But even assuming that respondent's written confession was a product of his initial remark, the second statement should not have been suppressed because there is no substantial likelihood that the first statement was actually coerced.

We do not dispute that when the first statement has been compelled, a subsequent statement that is a product of the first statement should also be inadmissible. We also recognize that the *Miranda* exclusionary rule is designed to deter abusive police questioning practices, and that it reflects in part the difficulty of determining reliably the voluntariness of statements obtained after prolonged incommunicado

police interrogation. But these considerations underlying the *Miranda* rules cannot possibly be undermined by admitting into evidence an alleged fruit of a prior statement when—as here—there is no substantial likelihood that the prior statement was actually compelled.

Admitting respondent's written confession is entirely consistent with the values underlying the Self-Incrimination Clause. When respondent decided to provide the State with the testimonial evidence it now seeks to use against him, he acted voluntarily and with an understanding of his right to remain silent if he chose to do so. At bottom, respondent's claim is not that his written confession was the product of coercion but that it was the product of his ignorance about the evidentiary status of his first statement. But such ignorance has never been thought to amount to coercion, and it should not be grounds for suppressing evidence when the only action by the police that was even arguably improper was a technical violation of *Miranda*.

ARGUMENT

RESPONDENT'S WRITTEN CONFESSION SHOULD NOT BE EXCLUDED FROM EVIDENCE

Before respondent gave the written confession at issue here, he was advised of his *Miranda* rights and waived those rights in writing. There is no suggestion that the officers used oppressive or abusive tactics in obtaining the confession. Ordinarily, the Self-Incrimination Clause of the Fifth Amendment would present no obstacle to the use of such a confession against a criminal defendant. The rationale of the Oregon Court of Appeals' contrary ruling is somewhat unclear, but in our view none of the reasons suggested by the court's opinion justifies the suppression of respondent's written confession.

A. Neither Of Respondent's Statements Was Compelled

1. The evil at which the Self-Incrimination Clause is aimed is *compelled* self-incriminating testimony. In this case, it appears to be beyond dispute that neither of respondent's statements was the product of actual compulsion. The trial court specifically found that "[t]here is a showing by the State that the statements were made freely and voluntarily" (J.A. 38). The Court of Appeals not only did not overturn this finding but appeared to agree that there was an "absence of actual threats and compulsion" (Pet. App. 4).

There is no evidence whatever that the officers used coercive tactics either at respondent's residence or at the stationhouse. Although the State has conceded that respondent was "in custody" within the meaning of *Miranda* at the time of his first statement, it is far from clear—as we will explain—that even this concession was sound. But assuming that respondent was "in custody," the most that can be said is that the first statement was obtained through a technical violation of *Miranda*. There is no suggestion that the police used abusive or oppressive tactics. And there is no suggestion that the police actions at the stationhouse were coercive or overbearing. Indeed, the stationhouse interrogation was plainly not irregular in any way; respondent received *Miranda* warnings and signed a written waiver.

2. The Court of Appeals suggested that respondent's first statement, by letting "the cat out of the bag," had a "coercive impact" that led to the second statement (Pet. App. 5). This appears to have been merely a careless use of the word "coercive" that does not reflect a determination that respondent's written statement was actually the product of compulsion within the meaning of the Self-Incrimination

Clause. In any event, it is clear that even when officers deliberately use a suspect's prior statement to cause him to make a second statement, the second statement has not been compelled within the meaning of the Fifth Amendment. This of course does not mean that the second statement will always be admissible into evidence: if the first statement was involuntary, we do not dispute that the subsequent statement should ordinarily be suppressed,[1] and if the first statement is inadmissible for some other reason, the second statement may also be subject to suppression. But it is incorrect to say that a subsequent statement that is merely induced by officers through the use of a prior statement, and is not itself the product of coercion, has been compelled within the meaning of the Fifth Amendment.

If a person speaks because he has been threatened with criminal punishment or physical violence, then, of course, his statement has been compelled. If his will has been overborne by such psychological tactics as isolation or relentless interrogation, then, too, the statement will be considered involuntary. On the other hand, if a person confesses because he has assessed the government's evidence against him and has decided that it is pointless to persist in his claims of innocence, his confession is the fully voluntary "product of a rational intellect and a free will" (*Blackburn* v. *Alabama*, 361 U.S. 199, 208 (1960)).

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[1] See pages 19-21, *infra*. Justice Harlan, in his opinion in *Darwin* v. *Connecticut*, 391 U.S. 346, 350-351 (1968), drew this distinction between a subsequent statement that is itself voluntary and is inadmissible only because it is the product of a prior, involuntary statement, and a subsequent statement that is involuntary because the conditions that compelled the first statement persist. See also *McMann* v. *Richardson*, 397 U.S. 759, 769 (1970).

Similarly, if a suspect is confronted with incriminating evidence and decides that it is in his interest to try to explain why the evidence does not necessarily inculpate him, his explanation is not compelled within the meaning of the Self-Incrimination Clause. Cf. *Oregon* v. *Mathiason*, 429 U.S. 492, 495-496 (1977); *Beckwith* v. *United States*, 425 U.S. 341 (1976).

These propositions are equally true when the evidence with which a suspect is confronted is his own prior statement. See *McMann* v. *Richardson*, 397 U.S. 759, 769 (1970). If the officers in this case had prompted respondent to confess by confronting him with a recording of an intercepted telephone conversation in which he planned the burglary, the confession might or might not be admissible—that would depend in part on the legality of the interception—but there is no doubt that it would be voluntary. The situation is not materially different when a suspect is confronted, not with an intercepted conversation, but with statements he has previously made to the officers themselves. It follows that, whatever the admissibility of respondent's written confession, that confession was not compelled, even if it was the product of the prior statement "I was there."

B. Respondent Validly Waived His *Miranda* Rights Before Making The Second Statement

Even a voluntary statement, of course, is inadmissible if it has been obtained in violation of the prophylactic rules established by *Miranda*. *Miranda* requires that unless a person in custody has been warned of his right to remain silent and his right to counsel and has made a voluntary and intelligent waiver of those rights, any statements he makes in response to interrogation cannot be used against him. 384 U.S. at 444-445.

As we have noted, respondent's second statement, on the surface, appears to have been obtained in circumstances that fully satisfied *Miranda*. Respondent was warned of his rights, and he executed a written waiver. Nothing about the interrogation atmosphere, and nothing in the behavior of the police or respondent, indicates that the waiver was not voluntary and intelligent.

Certain portions of the court of appeals' opinion, however, suggest that the court believed that the events at respondent's residence somehow vitiated his subsequent waiver of *Miranda* rights. For example, the Court of Appeals emphasized that only an hour elapsed between the two statements and that the same officers elicited both. This suggests that the court believed that the atmosphere created by the officers at the arrest scene—where, under the State's concession, *Miranda* was violated—carried over and invalidated respondent's subsequent waiver of his *Miranda* rights. This reading of the court's opinion is reinforced by its citation of *Westover* v. *United States*, a case decided with *Miranda* (see 384 U.S. at 494-497) in which this Court held that the atmosphere created by a particular course of custodial interrogation without warnings—during which the suspect did *not* confess, so there was no "fruits" question—carried over and undermined a waiver given, after warnings, in subsequent questioning.

To the extent the Court of Appeals concluded that respondent's waiver of his *Miranda* rights was invalid, it plainly erred. It is instructive to compare this case with *Westover*. Westover was interrogated at length, without warnings, while being held in custody for 14 hours by local police. During this period, he did not confess. Federal agents then took over the interrogation and, at the outset of their questioning, warned him of his rights. Two hours later, he confessed to the federal agents. 384 U.S. at 494-496. This Court ordered the confession suppressed because

the "intense and prolonged interrogation" (*Michigan* v. *Mosley*, 423 U.S. 96, 107 (1975)) that preceded the warnings had the effect of undermining the voluntary and intelligent character of the suspect's waiver of his rights (see *Miranda*, 384 U.S. at 495-497).

The contrast between *Westover* and this case could hardly be greater. Westover was subjected to lengthy, relentless interrogation while being held at a stationhouse; respondent was asked a few questions in his own living room. This case resembles *Westover* far less than it resembles *Beckwith* v. *United States*, *supra*, where the Court had little difficulty in concluding that no *Miranda* warnings were required. Indeed, in *Beckwith* the questioning was much more prolonged than it was here (see 425 U.S at 342-344).

To be sure, Beckwith was not in custody, and the State has conceded that respondent was in custody—and was therefore entitled to *Miranda* warnings—at the time he made his first statement. But we doubt that this concession was legally sound. The basis of *Miranda* was the Court's conclusion that warnings are needed to dispel coercive psychological forces that are created when a suspect is placed in custodial surroundings. See 384 U.S. at 448-458. It therefore seems evident that the test for whether a suspect is "in custody" within the meaning of *Miranda* must depend on whether a suspect would reasonably perceive that he has been subjected to formal arrest or its equivalent (see *California* v. *Beheler*, No. 82-1666 (July 6, 1983), slip op. 4)—not on the arresting officers' uncommunicated subjective intentions. Cf. *INS* v. *Delgado*, No. 82-1271 (Apr. 17, 1984), slip op. 5. See, *e.g.*, *United States* v. *Harris*, 611 F.2d 170, 173 (6th Cir. 1979) (defendant was not in custody because "[w]hile the agents might have prevented the defendant from leaving the room,

they never informed the defendant of that intention"); *United States* v. *Smith*, 441 F.2d 539, 540 (9th Cir. 1981) ("The unexpressed intent of the officer to detain Smith had he attempted to leave does not create a custodial interrogation."); *United States* v. *Hall*, 421 F.2d 540, 544-545 (2d Cir. 1969), cert. denied, 397 U.S. 990 (1970), quoted in *Steigler* v. *Anderson*, 496 F.2d 793, 799 (3d Cir.), cert. denied, 419 U.S. 1002 (1974). See also *United States* v. *Kennedy*, 573 F.2d 657, 660 (9th Cir. 1978) ("The relevant inquiry * * * is whether a reasonable person would have believed himself to be" under arrest.).

Here, there is little basis for a conclusion that respondent could have reasonably believed that he was under arrest. Respondent's mother was told that the officers had an arrest warrant, but there appears to be no evidence that respondent was told, before he made his statement, that the officers had a warrant or that they had come to the house for the purpose of arresting him. The officers testified (J.A. 10, 27) that they subjectively considered respondent to be under arrest at the time they interviewed him at his residence, but that is immaterial if the officers did not lead respondent to believe that he was under arrest.

Accordingly, the most that can be said is that the brief questioning at respondent's residence constituted a borderline violation of *Miranda*. This was plainly insufficient to draw into question the validity of respondent's subsequent waiver of his *Miranda* rights. *Miranda* requires that a suspect, after having been advised of his rights, "knowingly and intelligently waive[] his privilege against self-incrimination and his right to * * * counsel" (384 U.S. at 475). It is easy to see why Westover's ability to make such a waiver was impaired by the previous

course of interrogation.[2] But there is no reason to suppose that respondent even knew that he had been subjected to custodial interrogation. The interrogation in issue—a few questions, asked in an unthreatening manner in his living room with his parents nearby—could not possibly have impaired his ability to decide whether he wished to cooperate with the authorities. When he later received *Miranda* warnings, therefore, he had no reason to doubt that he was indeed free to terminate questioning or seek counsel if he wished. The court below identified nothing else about " 'the particular facts and circumstances [of the] case, including the background, experience, and conduct of the accused' " (*North Carolina* v. *Butler*, 441 U.S. 369, 374-375 (1979), quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); see *Edwards* v. *Arizona*, 451 U.S. 477, 486 n.9 (1981)) that might draw the validity of the waiver into question.

For these reasons, the Court of Appeals manifestly erred in suggesting that respondent's waiver of his *Miranda* rights was not effective. The most likely explanation of this error is that the court confused this issue with the analytically distinct question whether respondent's second statement was "tainted by" or was the "fruit of" the first statement. That

[2] Westover was subjected to the "inherently compelling pressures" (*Miranda*, 384 U.S. at 467) and the "badge of intimidation" (*id.* at 457) of the custodial environment for an extended period; the mere giving of warnings could reasonably be thought unlikely to restore his capacity to decide whether he wished to discuss his alleged offense with the authorities. Similarly, having been subject to the "interrogator's imprecations * * * that the interrogation will continue until a confession is obtained" (*id.* at 468), it is more than possible that Westover would not fully believe, when he was finally given warnings, that he actually was free to terminate questioning if he wished.

is, the court probably believed not that the prior *questioning* impaired respondent's ability to give a valid waiver but that respondent's previous *answer*—his statement "I was there"—rendered involuntary his subsequent decision to waive his *Miranda* rights and speak.

But as we have explained, this reasoning rests on a misconception. If respondent was induced to waive his *Miranda* rights by the knowledge that he had already made an incriminating statement to the officers, that did not make his waiver any less voluntary. Indeed, the fact that the authorities already possess incriminating evidence might well be a good reason for a suspect to decide to waive his rights and speak to them. The only substantial question concerning the admissibility of respondent's second statement is, therefore, not whether the waiver was valid but whether the admission of that statement is inconsistent with the "fruits" doctrine and the policies underlying it.

C. An Otherwise Admissible Statement Should Not Be Excluded From Evidence Solely Because It Is The Product Of A Statement Obtained In Violation Of *Miranda* When There Is No Substantial Probability That The First Statement Was Compelled

Miranda generally requires the exclusion from the prosecution's case-in-chief of a statement obtained through custodial interrogation without the proper warnings and waiver. But this Court has never decided whether evidence derived from such a statement—such as physical evidence or the testimony of witnesses whose existence is disclosed by the statement—must also be suppressed. In *Michigan* v. *Tucker*, 417 U.S. 433 (1974), the Court held that the testimony of a witness discovered through a statement obtained in violation of *Miranda* was admis-

sible; but the basis of the decision in *Tucker*, while highly relevant here, did not resolve the broad question whether the "fruits" of a *Miranda* violation may generally be admitted. *Massachusetts* v. *White*, aff'd by an equally divided Court, 439 U.S. 280 (1978), and *Massachusetts* v. *Meehan*, cert. dismissed as improvidently granted, 445 U.S. 39 (1980), concerned the admissibility of physical evidence derived from a statement obtained in violation of *Miranda*, but the Court did not decide the question in either case.

The question presented in this case—the admissibility of a subsequent statement by the suspect alleged to be the fruit of a prior statement that is inadmissible under *Miranda*—is obviously closely related to the question presented by fruits consisting of physical evidence or the testimony of witnesses. Indeed, in one respect at least, the argument for admitting the fruit is strongest in this context. Once a suspect has made a statement that is inadmissible under *Miranda*, he is powerless to prevent the authorities from uncovering any physical evidence or the testimony of witnesses to which his inadmissible statement might lead; but he can prevent them from deriving any subsequent statement simply by refusing to speak further.

In the Brief for the United States as Amicus Curiae in *Michigan* v. *Tucker*, *supra*, we urged that the *Miranda* exclusionary rule should be limited to the improperly obtained statements themselves and should not extend to fruits.[3] We adhere to that position, but we do not repeat the argument here because

[3] Copies of our brief in *Tucker* have been sent to the parties. We also relied on our brief in *Tucker* as the basis of part of our submission in *New York* v. *Quarles*, No. 82-1213 (argued Jan. 18, 1984).

we believe that the decision of the court below can be reversed on narrower grounds—either that the written confession was not in fact a product of the prior, inadmissible statement or that, even if it was, there is no justification for excluding it when the initial *Miranda* violation involved no substantial risk of actual compulsion.

1. Whatever the correct scope of the "fruit of the poisonous tree" doctrine in this case, respondent's second statement cannot be suppressed as a fruit unless it is causally connected to the first, inadmissible statement. That is, if it is established that respondent would have given his written confession even if he had not previously made an incriminating statement to the officers, the written statement cannot be considered a fruit and excluded from evidence on that basis.

The trial court found that "the evidence shows that there was no taint between the first statement 'I was there' and the second [statement]. * * * [T]here's no showing of any taint whatsoever" (J.A. 37-38). There are several reasons to accept this determination. First, respondent's first statement did not, in fact, let the cat out of the bag; it is implausible to suppose that respondent actually believed that he had nothing more to lose once he made the first brief remark. It requires little legal sophistication to realize that an admission that one was present at the scene of a crime is not tantamount to an admission that one was involved in it. A layman, in fact, is probably likely to overestimate the extent to which he can escape criminal liability or punishment by showing that he was only complicit in an offense and was not the instigator or the principal actor. Nor is there any evidence that respondent was aware of the probative value of oral statements to police officers; many suspects are not, and *Miranda* itself requires a

warning that a statement may be used against an accused precisely because the Court assumed that many suspects will be ignorant of this fact (see 384 U.S. at 468-469).

Second, there is no evidence that the officers used the first statement as part of their efforts to obtain the second statement. It appears that the officers did not mention the first statement to respondent during the stationhouse questioning or attempt to convince him that he had nothing more to lose by providing a full account of his actions.

Finally, as we have explained, respondent's second statement was preceded by a fully valid waiver of *Miranda* rights. This means, among other things, that respondent was specifically told that he did not have to speak to the officers, and that he understood this warning. His situation was therefore materially different from that of a suspect who may believe that he has some obligation to explain away his prior statement. Respondent's valid waiver further diminishes the likelihood that he was induced to speak by the knowledge that he had already made a statement to the officers.

2. Nonetheless, for the remainder of our discussion we will assume that respondent's written confession was the product of his prior inadmissible oral statement; that is, we assume that respondent would not have given the written confession had he not already made the limited admission that he was present at the scene of the burglary. It does not follow that the written confession must be suppressed. On the contrary, we submit that because it is clear that the first statement, although inadmissible under *Miranda*, was voluntary, the second statement should not be suppressed merely because it was a product of the first.

As the concurring opinion below suggested, the proliferation of figures of speech in this area—"fruit of the poisonous tree," "attenuation of taint," "cat out of the bag"—has tended, to a degree, to obscure analysis. The problem is further complicated because a confession may be excluded not only as the product of a prior coerced confession—a Fifth Amendment issue—but as the product of a prior Fourth Amendment violation. See, *e.g.*, *Brown* v. *Illinois*, 422 U.S. 590 (1975); *Wong Sun* v. *United States*, 371 U.S. 471 (1963). But "[t]he considerations underlying the Fifth Amendment 'fruits' doctrine are not necessarily the same as those relevant in the Fourth Amendment context" (*Pillsbury Co.* v. *Conboy*, No. 81-825 (Jan. 11, 1983), slip op. 7-8 n.3 (Blackmun, J., concurring)), and the "fruits" analysis that is familiar and relatively well-established in the Fourth Amendment area cannot simply be carried over bag and baggage to a case like this. See *United States* v. *Bayer*, 331 U.S. 532, 541 (1947) (The Fourth Amendment exclusionary rule concerns "evidence of a quite different category and do[es] not control this question.").

a. i. We do not dispute that when the authorities induce a suspect to make a further statement by using a previous statement that was actually *compelled*, the second statement is also inadmissible. In his separate opinion in *Darwin* v. *Connecticut*, 391 U.S. 346, 350-351 (1968), a case that involved an involuntary confession obtained through custodial interrogation, Justice Harlan gave an explanation of the basis of this rule: [4]

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[4] This rule is well established in cases in which the source of compulsion is irregular police practices during custodial interrogation. How and whether the rule should apply when the source of compulsion is legal process (for example, compelled

A principal reason why a suspect might make a second or third confession is simply that, having already confessed once or twice, he might think he has little to lose by repetition. If a first

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grand jury testimony under a grant of immunity) are difficult and uncertain questions. See generally *Pillsbury Co.* v. *Conboy, supra.* On the one hand, under the rule of *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), the privilege against self-incrimination extends not only to a compelled statement but to evidence derived from it. See also *Kastigar* v. *United States*, 406 U.S. 441, 453-454 (1972); *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 79 (1964). It might be said that a subsequent voluntary statement by the witness can be "derived" from his prior compelled testimony just as physical evidence, or the testimony of another person, can be so derived.

On the other hand, a subsequent voluntary statement by the witness is, by hypothesis, the product of an independent, deliberate decision to speak. The nexus between the compulsion and the derivative evidence is, therefore, much different from the case of derived physical evidence. In addition, a subsequent statement is the product not just of the prior statement but of the witness's ignorance about the evidentiary status of the prior statement. If a witness knew that his compelled statement could not be used against him, he would surely not be heard to claim that a subsequent voluntary statement was derived from the compelled statement. (Witnesses who are compelled to speak by legal process, unlike those compelled by police practices, are typically told that they have use immunity and therefore are seldom ignorant of the fact that their statement is inadmissible. This is presumably why questions parallel to those presented by this case seldom arise in the context of testimony compelled by judicial process.)

The fact that ignorance and not just compulsion is the source of the subsequent statement suggests that due process doctrines concerned with fairness—in addition to, or perhaps instead of, doctrines concerned with compelled self-incrimination—are the source of the rule excluding subsequent voluntary statements derived from prior compelled statements. Justice Harlan's remarks, quoted in text, suggest as much.

confession is not shown to be voluntary, I do not think a later confession that is merely a direct product of the earlier one should be held to be voluntary. It would be neither conducive to good police work, nor fair to a suspect, to allow the erroneous impression that he has nothing to lose to play the major role in a defendant's decision to speak a second or third time.

In consequence, when the prosecution seeks to use a confession uttered after an earlier one not found to be voluntary, it has, in my view the burden of proving not only that the later confession was not itself the product of improper threats or promises or coercive conditions, but also that it was not directly produced by the existence of the earlier confession.

The primary objective of any "fruits" rule in this context, therefore, should be to exclude statements that are the product of prior compelled statements. But it is of course well established that not every statement obtained in violation of *Miranda* has been compelled within the meaning of the Self-Incrimination Clause. See, *e.g.*, *Tucker*, 417 U.S. at 444-446; *Harris* v. *New York*, 401 U.S. 222 (1971); *Johnson* v. *New Jersey*, 384 U.S. 719, 729-730 (1966); *Miranda*, 384 U.S. at 457. This objective, therefore, does not necessitate a rule excluding from evidence the fruits of statements that are inadmissible solely because they have been obtained in violation of *Miranda*.

ii. In addition, the Court has made it clear that the *Miranda* rules serve a deterrent purpose. See, *e.g.*, *Oregon* v. *Hass*, 420 U.S. 714, 723 (1975); *Tucker*, 417 U.S. at 446-447. But it is important to be clear about what the *Miranda* exclusionary rule is designed to deter. This is one respect in which it is incorrect to draw a close parallel between the *Miranda* rules

and the Fourth Amendment exclusionary rule. The Fourth Amendment exclusionary rule (including its fruits doctrine) is designed to deter all unreasonable searches, to the extent that is practicable, because all unreasonable searches violate the Constitution. *Miranda*, however, is not designed to deter all custodial interrogation without warnings. Police officers do not violate any constitutional provision, threaten any constitutional value, act improperly in any way—or, indeed, violate any stricture of the *Miranda* opinion—if they conduct non-abusive custodial interrogation without giving *Miranda* warnings. All that *Miranda* requires is that the resulting statements not be admitted into evidence. This is because the Fifth Amendment privilege—which is the foundation of *Miranda*—does not prohibit the authorities from compelling incriminating statements; the Self-Incrimination Clause is violated only when a compelled statement is used against the speaker during a criminal prosecution.

It follows that even if officers deliberately decide to conduct questioning without warnings in circumstances that they know might be deemed custodial, they have not engaged in an improper practice so long as they have not acted abusively. Cf. *Massiah* v. *United States*, 377 U.S. 201, 206-207 (1964). In fact, it is not difficult to imagine instances—if a suspect in custody is thought to know the location of a kidnapping victim or a bomb that is about to explode, for example—where the far better police practice might be to conduct the interrogation without warnings, thus rendering inadmissible any statement that is obtained but increasing the likelihood that the suspect will speak. Accordingly, the primary "deterrence" objective of the *Miranda* exclusionary rule—including any rule concerning the fruits of a *Miranda*

violation—is not to deter police from questioning suspects in custody without warnings, but rather to deter abusive police practices.

b. As we have noted, this Court has not yet resolved the question whether fruits of voluntary statements obtained in violation of *Miranda* are generally admissible. See *Tucker*, 417 U.S. at 446. But *United States* v. *Bayer*, *supra*, strongly suggests that the Court would not require the suppression of every statement that is the product of a prior voluntary statement inadmissible under *Miranda*. In *Bayer*, the authorities questioned a suspect in custody under circumstances that were assumed to violate a prophylactic rule that served purposes similar to those of *Miranda*—the rule of *McNabb* v. *United States*, 318 U.S. 332 (1943), which excluded evidence obtained from a defendant who was not brought before a magistrate without undue delay (compare 384 U.S. at 463 with 318 U.S. at 342-345). Subsequently, the authorities obtained a further statement under circumstances that were not themselves suspect but that left little doubt that the second statement was the product of the first.[5] This Court reversed a ruling that the second statement was inadmissible, reasoning as follows (331 U.S. at 540-541):

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of

---

[5] The Court explained (331 U.S. at 540) that after his first statement the suspect volunteered some additional facts, and the meeting at which the second statement was obtained "was to incorporate the whole story in one statement. * * * [The suspect] requested the original statement and read it before making the second. The [second] statement is labelled a 'supplementary' statement and is 'basically' the same as the earlier one but went into more detail."

> the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.

It would appear to follow from the holding in *Bayer* that subsequent statements that are the product of statements obtained in violation of *Miranda* may nevertheless be admissible on at least some occasions. Consequently, leaving aside the possibility of a general rule that all such fruits are admissible, application of the fruits doctrine must involve some inquiry into the particular facts of the case. We note that such an inquiry does not impair the certainty and rigidity that are sometimes thought to be a principal virtue of *Miranda*:[6] while it is generally desirable to have relatively clear and mechanical rules

[6] We believe these virtues are substantially overstated. The question whether a suspect is "in custody" for *Miranda* purposes is not one that can be resolved by the use of a bright-line standard. See *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), slip op. 15 (plurality opinion). See also *United States* v. *Harris*, 611 F.2d at 172; *United States* v. *Jimenez*, 602 F.2d 139, 143 (7th Cir. 1979); *United States* v. *Kennedy*, 573 F.2d at 660; *United States* v. *Del Soccorro Castro*, 573 F.2d 213, 215 (5th Cir. 1978); *Steigler* v. *Anderson*, 496 F.2d at 799-800; *United States* v. *Hall*, 421 F.2d at 541.

Moreover, under *Harris* v. *New York*, 401 U.S. 222 (1971), in order to decide whether a statement obtained in violation of *Miranda* can be used for impeachment, a court must inquire into the particular circumstances involved to determine if the statement was voluntary.

to guide police behavior, a doctrine governing the admissibility of fruits—in this or other contexts (*e.g.*, *United States* v. *Ceccolini*, 435 U.S. 268 (1978))—is not a guideline for police behavior but a principle for courts to apply in delineating rules of evidence.

c. We submit that exclusion of an otherwise admissible voluntary statement as a fruit of a *Miranda* violation is justifiable, if at all, only when there is a substantial probability that the *Miranda* violation involved actual compulsion. In our view, a rule admitting the second statement when the first was clearly not compelled cannot undermine the purposes of *Miranda* and the Self-Incrimination Clause.[7]

[7] The admission of fruits in these circumstances is not inconsistent with *Harrison* v. *United States*, 392 U.S. 219 (1968). In that case, the government introduced into evidence at trial three confessions made by the defendant. The defendant then testified in his own behalf. On appeal, the confessions were held to be inadmissible, although not because they had been coerced. On retrial, the government was permitted to introduce a transcript of the testimony the defendant had given at the first trial. This Court, finding that the defendant's testimony at the first trial was at least in part the fruit of the improper admission of his confessions at that trial (*id.* at 224-226), held the testimony inadmissible.

In *Harrison*, however, the Court explicitly relied not just on the need to deter the government from obtaining confessions improperly, but on "'the imperative of judicial integrity'" (392 U.S. at 224 n.10 (quoting *Elkins* v. *United States*, 364 U.S. 206, 222 (1960)). *Harrison* is crucially different from this case (even assuming that respondent's second statement was the product of his earlier utterance) because in *Harrison* the trial court erred in sustaining the government's efforts to have the confessions admitted into evidence and as a result of that error the government was able to obtain a further damaging statement. There is an interest in preventing the defendant from being prejudiced by an erroneous judicial ruling that is quite distinct from the interests implicated in the present case.

i. The first task of a "fruits" doctrine in this area, as we noted, is to exclude the fruits of compelled statements. This objective is plainly not jeopardized by a rule allowing in evidence the fruits of clearly voluntary prior statements like respondent's first statement in this case. To go further, and exclude every statement that is the product of a prior statement inadmissible under *Miranda*, no matter how clearly voluntary the prior statement, would unnecessarily suppress much highly probative evidence. The government may use voluntary statements obtained in violation of *Miranda* in significant ways in which it could not use compelled statements—for example, to impeach a defendant's testimony at trial. Compare *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978), and *New Jersey* v. *Portash*, 440 U.S. 450 (1979), with *Harris* v. *New York*, *supra*, and *Oregon* v. *Hass*, *supra*. Similarly, there is no sufficient reason to preclude the government from using the fruits of statements that were obtained in violation of *Miranda* but are plainly not coerced.

ii. The decision in *Miranda* was largely rooted in the Court's concern that the traditional voluntariness standard was difficult to apply to incommunicado stationhouse interrogation in a way that gave confidence in the reliability of the ultimate determination. See, *e.g.*, 384 U.S. at 445, 461. The only witnesses to such questioning, generally, were the suspect and the police officers, neither of whose testimony was entirely reliable. Moreover, the inquiry into whether the suspect's will was overborne by coercive interrogation tactics sought to answer a subtle, elusive, subjective question about state of mind—a question that was made even more difficult because the interrogating officers often employed sophisticated psychological strategies, and because the correct answer depended upon nuances that were impossible to reconstruct in

court. See *id.* at 448-458. Under these circumstances, there appeared to be an unacceptably high risk of error in the determination of voluntariness, with a consequent danger that the use of the confession would in fact involve an undetected infringement of the constitutional privilege against self-incrimination.

These considerations, when combined with the principle that the fruits of compelled statements are inadmissible, afford a rational basis for excluding the fruits of a *Miranda* violation if the violation consists of incommunicado police interrogation of a kind that creates an appreciable possibility of undetected coercion. But they provide no justification for excluding the fruits of a *Miranda* violation when the questioning occurs in a setting in which—as with the questioning at respondent's residence—it can be reliably determined that the initial statement was not actually compelled.[8]

iii. Permitting the admission of respondent's written confession will not encourage police officers to engage in practices that are even arguably abusive. To begin with, many questionable police practices in this area can be deterred under the rules governing the waiver of *Miranda* rights, without resort to a fruits doctrine at all. For example, if police officers conduct a prolonged stationhouse interrogation without warnings, in order to obtain a statement (itself

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[8] It is true, of course, that a suspect has the right to *Miranda* warnings whenever he is subjected to custodial interrogation, even in circumstances in which there is little or no risk of actual compulsion. But this aspect of *Miranda* is based, we believe, on the need to specify an identifiable line that will facilitate administration of the rule by the police, not on the concern about undetected coercion that is at the heart of *Miranda*. As we have noted (pages 24-25, *supra*), the need to define a clear standard is a far less important concern in the context of expounding a "fruits" doctrine.

inadmissible under *Miranda*) that can be used to elicit a second confession after the suspect has been given proper warnings, *Westover* would ensure the failure of their strategy; the waiver that preceded the second statement would plainly be invalid. In all likelihood, the officers would have to release the suspect or allow him substantial contacts with outsiders before they could attempt to take advantage of the prior statement. Knowing this, the officers would be unlikely to engage in such a practice in the first place.

But even if it is thought that it will sometimes be necessary to rely on a *Miranda* fruits exclusionary principle in order to deter abusive police practices, there is no justification for suppressing a subsequent statement derived from a prior inadmissible statement when—as here—there is no substantial probability that the first statement was coerced. The abusive police practices with which *Miranda* is concerned are those that are likely to create a substantial risk of coercion. To the extent that the decision to admit a fruit depends on whether there was a substantial probability of coercion, law enforcement officers have no incentive to create a situation that is even arguably coercive.

iv. Finally, admitting respondent's written confession does not offend against any of the values underlying the Self-Incrimination Clause; in no meaningful sense can it be said that if respondent's written confession is admitted he will have been compelled to testify against himself. Indeed, the admission of a subsequent statement in a case such as this seems even more clearly consistent with the principles of the Self-Incrimination Clause than the admission of other fruits of a *Miranda* violation, such as physical fruits or a witness's testimony.

That is because, in this case, the incriminating evidence against respondent resulted not solely from a

decision to speak made without benefit of *Miranda* warnings, but from a subsequent "exercise of 'a rational intellect and a free will'" (*Mincey*, 437 U.S. at 398 (citation omitted)). Moreover, before respondent spoke at the stationhouse he made, as we have shown, a fully effective waiver of his *Miranda* rights. In other words, before respondent decided to produce the testimonial evidence that the State now seeks to use against him, he fully understood that he did not have to speak, and he voluntarily and intelligently chose to do so nonetheless. It is difficult to see why the principles of the Self-Incrimination Clause should require the suppression of a statement given in these circumstances.

At bottom, the complaint of a suspect in respondent's position is not that he was coerced but that he did not know the evidentiary status of his prior statement. If respondent knew that his first statement was inadmissible, he could not possibly contend that his second statement should be suppressed. See *McMann*, 397 U.S. at 768. But the Self-Incrimination Clause does not require the exclusion of statements that are made because a suspect is not fully aware of what evidence can and cannot be used at his trial. Cf. *Beheler*, slip op. 5 n.3; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226-227, 234 (1973). If, for example, police officers induced a defendant to confess by confronting him with another party's inadmissible hearsay statement, the confession would not be suppressed. There is no reason for a different result in this case, where coercion is, similarly, wholly lacking, and the inadmissibility results from what can fairly be described as at most a technical violation of *Miranda*.[9]

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[9] It appears that the admission into evidence of respondent's written confession would constitute no significant in-

CONCLUSION

The judgment of the Oregon Court of Appeals should be reversed.

Respectfully submitted.

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MAY 1984

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novation in the way *Miranda* is now applied by the courts of appeals. In cases in which a defendant made two confessions, the first of which was voluntary but inadmissible under *Miranda*, the courts of appeals appear consistently to have inquired only into whether the second statement was preceded by a valid waiver. They have, in general, not independently considered whether the second statment should be suppressed as a fruit. See, *e.g.*, *United States* v. *Packer*, 730 F.2d 1151, 1157-1158 (8th Cir. 1984); *Bartlett* v. *Allen*, 724 F.2d 1524, 1527-1528 (11th Cir. 1984); *United States* v. *Bowler*, 561 F.2d 1323, 1326 (9th Cir. 1977); *United States* v. *Toral*, 536 F.2d 893, 896-897 (9th Cir. 1976); *Knott* v. *Howard*, 511 F.2d 1060, 1061 (1st Cir. 1975); *United States* v. *Hale*, 397 F.2d 427, 429-431 (7th Cir.), cert. denied, 393 U.S. 1067 (1968); *United States* v. *Knight*, 395 F.2d 971, 973-975 (2d Cir. 1968), cert. denied, 395 U.S. 930 (1969).

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(6)

No. 83-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OREGON, *Petitioner*,

v.

MICHAEL JAMES ELSTAD, *Respondent*.

On Writ Of Certiorari To The Court Of Appeals Of The State Of Oregon

---

BRIEF FOR RESPONDENT

---

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QUESTION PRESENTED

Where a first confession from a suspect has been obtained by an arresting officer during custodial interrogation without *Miranda* warnings, should a second confession by the suspect to the same officer be excluded from evidence in a case in which the only significant intervening factor between the confessions is the giving of *Miranda* warnings?

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STATEMENT OF THE CASE

Statement Of Facts

Sheriff Deputies Burke and McAllister went to Michael Elstad's house during the afternoon of December 17, 1981, with an arrest warrant charging Elstad with a burglary at a neighbor's house (J.A. 8-9). Elstad's mother answered the door (J.A. 8, 18). McAllister and Burke identified themselves as police officers and asked to speak with Elstad (J.A. 18). Mrs. Elstad said Michael was in his bedroom. The officers asked her to show them the bedroom, and she complied (J.A. 9, 19).

McAllister testified the officers "went in there and got Mr. Elstad dressed and out of bed" (J.A. 9). Elstad was laying on the bed under a sheet or blanket to about his waist (J.A. 26). He was wearing only a pair of shorts (J.A. 18). Burke testified they asked Elstad to get up and get dressed (J.A. 19). Both officers remained in the bedroom while Elstad dressed himself (J.A. 26-27). They then took Elstad to the living room (J.A. 19).

McAllister "took" Mrs. Elstad to the kitchen to explain to her why they were there (J.A. 9, 19). He testified:

> "Q. [BY HALBLEIB:] Now, what was your purpose in taking Mrs. Elstad in the kitchen area?
>
> "A. [MCALLISTER:] She was not completely aware of why we were there. Obviously creates some tension and stress for her when we take the young fellow out of bed, so I explained to her." (J.A. 9).

McAllister felt that Mrs. Elstad had a right to know what was going on.

McAllister testified Elstad was arrested when he was taken to the living room (J.A. 10). Burke testified the arrest occurred in the bedroom, although Elstad was not told he was under arrest (J.A. 27).

Burke sat down with Elstad in the living room (J.A. 19). Burke testified the following then occurred:

> "A. I sat down with Mr. Elstad and I asked him if he was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did, and also added that he heard that there was a robbery at the Gross house. And at that point I told Mr. Elstad that I felt he was involved in that, and he looked at me and stated, 'Yes, I was there.' "
>
> (J.A. 19-20).

On cross-examination, Burke testified:

> "Q. [BY DEPENBROCK:] You got to the living room.
>
> "A. [BURKE:] Yes.
>
> "Q. Defendant sat down and you stood up.
>
> "A. Yes.
>
> "Q. And then you initiated—you said something.
>
> "A. Yes, I did, I said, 'You know why we're here.'
>
> "Q. And what was his response[sic] to that?
>
> "A. His response was no, he did not know why we were there.
>
> "Q. And what did you say following that?
>
> "A. I asked him if he knew a Mr. Gross.
>
> "Q. That was your exact words, 'Do you know Mr. Gross?'
>
> "A. It may not have been the exact words, but it was basically the exact words. I may have said do you know the Gross family or do you know Mr. Gross or very similar words to that effect.

> "Q. Did you say anything like I have reliable information that you're involved in a burglary?
>
> "A. I don't recall that.
>
> "Q. And in response to your question to him as to whether or not he knew Mr. Gross, what, if anything, did the defendant say or do?
>
> "A. He looked around a little bit toward the kitchen to where his mother was and looked back at me and fidgeted just a bit and said he had heard about the burglary.
>
> "Q. Okay.
>
> "A. And I asked what he knew about the burglary, and he said, 'I was there.'
>
> "Q. You asked him what do you know about the burglary?
>
> "A. Yes.
>
> "Q. Okay. At any time prior to making any of these statements or hearing anything of the defendant, did you advise him of his rights, what are commonly known as Miranda rights?
>
> "A. Not at that point." (J.A. 28-29).

Elstad was placed in the officers' patrol car. His father came home while he was in the car (J.A. 20). The elder Elstad became agitated and began to reprimand his son. Burke asked Mr. Elstad to step back (J.A. 21).

Burke and McAllister responded to a robbery report while they were driving Elstad to the sheriff's office (J.A. 32). Elstad remained in the patrol car while the officers investigated the robbery (J.A. 32-33). Elstad was subsequently driven to the sheriff's office in another patrol car (J.A. 33).

Burke and McAllister arrived at the jail 45-60 minutes after leaving defendant's house (J.A. 11, 33). McAllister

gave Elstad *Miranda* warnings (J.A. 21-22). Elstad signed a constitutional rights waiver card and gave a written statement admitting he participated in the burglary (J.A. 11, 13, 21-22). Burke, McAllister and Elstad were the only people present when the confession was made (J.A. 14).

SUMMARY OF ARGUMENT

I.

Elstad was interrogated by the police after he was arrested at his house. He was in custody at the time, and *Miranda* warnings were not given before the interrogation. He admitted participating in a burglary in response to a police officer's accusation that he was involved in the crime.

Elstad's initial confession was obtained in violation of his right against compulsory self-incrimination because the police failed to give him any *Miranda* warnings before the interrogation. The failure to give *Miranda* warnings was a flagrant violation of Elstad's Fifth Amendment right against compulsory self-incrimination.

II.

The fruit of the poisonous tree doctrine applies to a second confession obtained after a person has previously confessed during a custodial interrogation without benefit of *Miranda* warnings. The second confession is presumptively tainted by the initial unconstitutionally obtained confession.

In deciding whether the second conviction is admissible, the Court must decide whether there has been a break in the stream of events sufficient to remove the taint of the first confession. The Court must look to objective factors in making this determination. The Oregon

Court of Appeals correctly applied the fruit of the poisonous tree doctrine in this case.

III.

Miranda warnings alone cannot remove the taint of an earlier custodial confession made without *Miranda* warnings. The adoption of such a rule would substantially dilute the exclusionary rule in the Fifth Amendment context. Any incentive to avoid Fifth amendment violations would be eviscerated by making *Miranda* warnings a cure-all in cases in which the police have interrogated a person in custody without warnings and obtained a confession.

IV.

Exclusion of Elstad's written confession by the Oregon Court of Appeals was consistent with the "cat out of the bag" analysis first mentioned in *United States* v. *Bayer*, 331 U.S. 532 (1947).

V.

Exclusion of Elstad's written confession is consistent with the rationales of the exclusionary rule. The written confession was tainted by Elstad's earlier oral confession. Exclusion furthers the goal of protecting persons against police violations of the Fifth Amendment and the constitutional safeguards established in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Exclusion protects the courts from receiving illegal and unreliable evidence.

The deterrence rationale of the exclusionary rule is well served by exclusion of Elstad's written confession. All police officers understand that when they arrest a person with a warrant they must give the person *Miranda* warnings before interrogation. The giving of the warnings and adherence to the principles of the *Miranda* deci-

sion will be greatly encouraged if police know that both a custodial confession obtained without warnings and a subsequent non-attenuated confession will be excluded from evidence.

ARGUMENT

I.

The Failure Of The Police To Give Elstad Miranda Warnings Prior To The Initial Interrogation At His House Deprived Elstad Of His Right Against Compulsory Self-incrimination.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court extended the greater protections inherent in the Sixth Amendment right to counsel to Fifth Amendment custodial encounters. To dispel the subtle compulsion inherent in custodial interrogation, the Court established "critical safeguards" for the right and promulgated concrete constitutional guidelines which must be followed in order to honor the exercise of the right.

The *Miranda* warnings were created to protect the right against compulsory self-incrimination. In the *Miranda* opinion, the Court stated that it "might not find the defendants' statements to have been involuntary in traditional terms." 384 U.S. 457. That did not prevent the Court from holding that the defendants' Fifth Amendment rights had been violated by the failure to give full warnings:

> "The *constitutional issue* we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way * * *" 384 U.S. at 445 (Emphasis added).

The *Miranda* Court recognized that compulsion is inherent in custodial surroundings. A statement obtained from a person in such surroundings is not truly the product of a person's free choice "unless adequate protective devices are employed to dispel the compulsion." 384 U.S. at 458. Both inculpatory and exculpatory statements are excluded from a criminal trial if they are obtained during custodial interrogation without adequate *Miranda* warnings.

This Court's decision in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), is highly relevant to the resolution of the instant case. Tucker sought to suppress the testimony of a witness whose identity the police learned from Tucker during custodial interrogation. The interrogation took place before the *Miranda* decision, but *Miranda* applied because Tucker's trial was after that decision. *See Johnson* v. *New Jersey*, 384 U.S. 719 (1966). The police told Tucker he had the right to remain silent and to an attorney and that any statements he might make could be used against him in court. He was not told that an attorney would be appointed for him if he was indigent. Therefore, the *Miranda* warnings were incomplete, and Tucker's statements to the police were excluded from his trial.

This Court held that the witness' testimony against Tucker was admissible. In reaching that holding, the Court found that Tucker was not deprived of his right against compulsory self-incrimination by the failure of the police to "make available to him the full measure of procedural safeguards associated with that right since Miranda." 417 U.S. at 444. The opinion further states:

> "* * * The District Court in this case noted that the police had 'warned [respondent] that he had the right to remain silent,' 352 F Supp 266, 267 (1972), and the record in this case clearly shows that respondent was informed that any evidence taken could be used against him.' The record is also clear that respondent was asked whether he wanted an attorney and that he replied that he did not. Thus, his state-

ments could hardly be termed involuntary as that term has been defined in the decisions of this Court. * * * " 417 U.S. at 444-445 (footnotes omitted).

There was "no compulsion sufficient to breach the right against compulsory self-incrimination." 417 U.S. at 445. There was, however, an "inadvertent disregard" of the procedural rules established in *Miranda*. *Id.* In most important respects Tucker was advised of his rights. The Court also noted that no right of the witness was violated by the failure to completely warn Tucker.

The facts of the instant case are different from *Tucker*. Elstad was interrogated[1] while in custody[2] without any *Miranda* warnings. The police did not simply omit one of the warnings as in *Tucker*. The facts of this case are particularly offensive. The officers made no attempt to comply with *Miranda*, although they had an arrest warrant, and both officers believed Elstad was under arrest at the time.

The clear rule of *Miranda* is that the warnings are required before custodial interrogation. Any police offic-

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[1] There is no dispute that Elstad was "interrogated" for purposes of *Miranda* when he was initially questioned at his house. *Rhode Island* v. *Innis*, 446 U.S. 291, 300-301 (1980).

[2] The state has always conceded that Elstad was in "custody" for purposes of *Miranda*. (Petitioner's Brief p. 5). The Solicitor General, as amicus curiae, argues that Elstad's first confession did not occur during custodial interrogation. (Brief for the United States pp. 12-13). There is no merit to the contention that *Miranda* warnings were not required prior to the first interrogation. Elstad was in custody at the time. *Orozco* v. *Texas*, 394 U.S. 324 (1969).

The Solicitor General should be precluded from claiming the absence of custody for the first time in this Court, because the state failed to raise and argue this issue in the Oregon courts. *Steagald* v. *United States*, 451 U.S. 204, 208-209 (1981); *Cady* v. *Dombrowski*, 413 U.S. 433, 442 (1973).

er, even a rookie working his first shift, must be expected to understand that rule.[3] Yet the officers in this case chose to disregard this mandate.

The state and the Solicitor General repeatedly attempt to diminish the seriousness of the officers' failure to give Elstad *Miranda* warnings before the first interrogation. The state asserts that there was "nothing particularly offensive" about the failure to give *Miranda* warnings. (Petitioner's Brief p. 41). On a record that is silent on the point, the state speculates that the omission was probably through inadvertence or because the officers somehow failed to understand what constitutes "custody" for *Miranda* purposes. (Petitioner's Brief pp. 39-40). The Solicitor General claims that the failure to give warnings was at worst a "technical" violation of *Miranda*. It is surprising that, 18 years after the *Miranda* opinion, experienced state and federal prosecutors take such a cavalier view of the basic teaching of that landmark decision.[4]

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[3] The record shows that Officer Burke had been a deputy sheriff for about three years (J.A. 25). The record is silent about Officer McAllister's experience. All Oregon police officers in the course of their initial trianing receive detailed instructions on arrest procedures, interrogation techniques, and the absolute requirement of giving *Miranda* warnings before commencing custodial interrogation. For example, Oregon State Police Officers carry copies of the *Oregon Police Manual* (1979) fully detailing the arrest and *Miranda* procedures.

[4] The argument of the state and the Solicitor General that there was little inherently coercive about the living room interrogation is rebutted by Officer McAllister's testimony. He testified he took Mrs. Elstad to the kitchen so explain why they were there because the situation "[o]bviously creates some tension and stress for her when we take the young fellow out of bed, so I explained to her" (J.A. 9). McAllister felt Mrs. Elstad had a right to know what was going on (J.A. 10). It is beyond question that greater tension and stress will be

It is not difficult to understand that when a person is arrested pursuant to a warrant the person is in custody and *Miranda* warnings are required before interrogation. Both officers testified they believed Elstad was under arrest before the interrogation at his house. Their failure to give Elstad *Miranda* warnings was not a technical violation of *Miranda*. This Court stated in *Miranda*:

> "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of incustody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." 384 U.S. at 467.

The failure of the police to give any *Miranda* warnings before custodial interrogation deprives an arrestee of his

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experienced by a person who is actually arrested. Notwithstanding the officer's testimony, the state asserts that "the setting was casual and relaxed." (Petitioner's Brief p. 39). The record simply does not support that conclusion.

While McAllister felt that Mrs. Elstad had a right to know what was going on, Burke clearly did not believe Elstad had that right when he was first questioned. Burke asked Elstad if he knew why the police were there to talk to him. Elstad said he had no idea why they were there. Burke did not then tell Elstad why they were there. Rather, he began to question him about the burglary.

right against compulsory self-incrimination. A confession obtained without warnings may or may not be involuntary in the sense that it is a result of the arrestee's overborne will caused by police use of the "third degree." That confession, however, is involuntary and inadmissible as a matter of law because the police violated the arrestee's right against compulsory self-incrimination. This is in contrast to the situation in *Michigan* v. *Tucker*, 417 U.S 433 (1974), where the right against compulsory self-incrimination was not violated, because there was only inadvertent disregard of a portion of the procedural rules established in *Miranda*. In addition, the warning in *Tucker* occurred before the *Miranda* decision and included advisal of the rights to remain silent and to an attorney and that anything Tucker said could be used against him in court. The Oregon Court of Appeals correctly held that Elstad's first confession was "unconstitutionally obtained." *State* v. *Elstad*, 61 Or. App. 673, 658 P.2d 552 (1983) (Petition for Certiorari, Appendix A p. 4).

The state's argument that the officers' failure to give Elstad *Miranda* warnings before custodial interrogation at his house did not deprive him of his right against compulsory self-incrimination fails in light of *Michigan* v. *Tucker*, 417 U.S. 433 (1974) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

II.

Elstad's Written Confession Was Properly Excluded As Fruit Of The Earlier Oral Confession. Miranda Warnings Alone Cannot Dissipate The Taint Of An Earlier Custodial Confession Made Without Miranda Warnings.

A. The Oregon Court of Appeals properly concluded that Elstad's written confession was tainted by his earlier oral confession.

Elstad's written confession was tainted by his earlier oral confession and properly excluded as fruit of the poiso-

nous tree.[5] The fruit of the poisonous tree doctrine applies to consecutive confession cases.

Another highly relevant case is *Harrison* v. *United States*, 392 U.S. 219 (1968). Harrison was tried for felony murder and the prosecution introduced three confessions he allegedly made while in the custody of the police. Harrison testified he was present when the victim died but the death was accidental. A federal appeals court reversed the conviction on the ground that the confessions were obtained in violation of the rule of *Mallory* v. *United States*, 354 U.S. 449 (1957). (Interpreting a Rule of Federal Criminal Procedure, requiring that a person under arrest must be taken to a committing magistrate without unnecessary delay).

At Harrison's retrial, the government introduced a transcript of his testimony at the previous trial. Harrison was again convicted and appealed, arguing that the transcript of the prior testimony should have been excluded from the retrial as fruits of the illegally obtained confessions. This Court held that the trial testimony was tainted and should have been suppressed.

The facts of *Harrison* are obviously different from the facts of the instant case. It is important, however, that

[5] The analysis of the Oregon Court of Appeals is consistent with both state and lower federal court decisions. *See United States* v. *Nash*, 563 F.2d 1166 (5th Cir. 1977); *Randall* v. *Estelle*, 492 F.2d 118 (5th Cir. 1974); *Fisher* v. *Scafati*, 439 F.2d 307 (1st Cir. 1971); *Gilpin* v. *United States*, 415 F.2d 638 (5th Cir. 1969); *Harney* v. *United States*, 407 F.2d 586 (5th Cir. 1969); *Evans* v. *United States*, 375 F.2d 355 (8th Cir. 1969); *Commonwealth* v. *Brittain*, 455 Pa. 562, 317 A.2d 219 (1974); *People* v. *Algeien*, 180 Colo. 1, 501 P.2d 468 (1972); *Brunson* v. *State*, 264 So.2d 817 (Miss. 1972); *Commonwealth* v. *Ware*, 438 Pa. 517, 265 A.2d 790 (1980); *Cagle* v. *State*, 221 So.2d 119 (Ala. App. 1969); *State* v. *Lekas*, 201 Kan. 579, 442 P.2d 11 (1968).

the *Harrison* Court did apply the fruit of the poisonous tree doctrine to suppress evidence obtained as the result of inadmissible confessions that were not involuntary in the traditional sense. 392 U.S. at 233 (White dissenting). The opinion states:

> ". . . The question is not *whether* the petitioner made a knowing decision to testify, but *why*. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible. . . .
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> "The remaining question is whether the petitioner's trial testimony was in fact impelled by the prosecution's wrongful use of his illegally obtained confessions. It is, of course, difficult to unravel the many considerations that might have led the petitioner to take the witness stand at his former trial. But, having illegally placed his confessions before the jury, the Government can hardly demand a demonstration by the petitioner that he would not have testified as he did if his inadmissible confessions had not been used. . . ." 392 U.S. at 223 (footnote omitted, emphasis in original).

The same approach should apply to a second custodial confession made after a confession which is inadmissible because the police failed to give *Miranda* warnings.

The Court in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), after concluding that Tucker's right against compulsory self-incriminatin had not been abridged, went on to decide as a "question of principle" whether the witness' testimony should have been excluded from the trial. 417 U.S. at 446. The Court observed that the prime purpose of the exclusionary rule in the Fourth Amendment search-and-seizure context is to deter future unlawful

police conduct. The Court then stated, "In a proper case this rationale would seem applicable to the Fifth Amendment context as well." 417 U.S. at 447.

Therefore, when a person's right against compulsory self-incrimination has been deprived, the exclusionary rule should apply to both the statements obtained without warnings and evidence obtained as a result of the statements under the same analysis developed in Fourth Amendment cases. *See Brown* v. *Illinois*, 422 U.S. 590 (1975); *Wong Sun* v. *United States*, 317 U.S. 471 (1963). In order to be admissible at trial, derivative evidence must not be tainted fruit of the poisonous tree.

Elstad's oral confession was made at his house shortly after the officer began questioning him about the burglary. He was in his bed listening to a stereo when the officers first encountered him. Elstad was wearing only a pair of shorts. The officers told Elstad to get dressed and come to the living room. According to Officer McAllister, they "went in there and got Mr. Elstad dressed and out of bed." (J.A. 9). Officer McAllister took Mrs. Elstad to the kitchen and told her that they had an arrest warrant for her son. Meanwhile, Officer Burke took Elstad to the living room where the interrogation took place on a couch. No *Miranda* warnings were given.

The officer told Elstad that he felt Elstad was involved in the burglary. Elstad then admitted involvement by stating "Yes, I was there." The officer broke off the interrogation after the admission was obtained. The police drove Elstad to the county jail/police station, where the same two officers interrogated Elstad in McAllister's office. Elstad was given *Miranda* warnings before this interrogation and he signed a waiver card. His written confession then followed.

The only significant intervening facts between the two confessions in this case were the move to the police station and the giving of *Miranda* warnings before the second interrogation. Elstad was continuously in police custody from the time he first encountered the police in his bedroom.

The Oregon Court of Appeals looked at the facts of this case to determine if there was a sufficient break in the stream of events to remove the taint of the first illegally obtained confession. The court applied the correct analysis. The opinion states:

> "The state does not dispute that the statement elicited from defendant at his home was inadmissible. Our inquiry here is whether there was a suffucient break in the stream of events between that inadmissible statement and the written confession to insulate the latter statement from the effect of what went before. *Clewis* v. *Texas*, 386 US 707, 87 S Ct 1338, 18 L Ed 2d 423 (1967); *State* v. *Mendacino*, 288 Or 231, 603 P2d 1376 (1979)."

State v. *Elstad*, 61 Or. App. 673, 676, 658 P.2d 552 (1983). (Petition for Certiorari, Appendix A p. 3).

The move to the jail was not sufficient. The police controlled Elstad at all times. For example, when Elstad's father became agitated and began berating his son as he was sitting in the police car, the police moved the father away.

B. *Miranda* warnings, by themselves, are insufficient to remove the taint of the prior inadmissible confession.

The only intervening factor that could possibly have broken the stream of events and dissipated the taint of the first confession was the giving of *Miranda* warnings before the second interrogation. The Oregon Court of Appeals properly rejected the state's argument that the

warnings were adequate to insulate the second confession in this case. This Court should clearly hold that *Miranda* warnings alone are insufficient to remove the taint of a custodial confession obtained without warnings, where a person makes a later custodial confession to the same crime. Such a holding is consistent with the approach taken by this Court in *Brown* v. *Illinois*, 422 U.S. 590 (1975).

The defendant in *Brown* was arrested without probable cause and without a warrant. The purpose of the arrest was to question him about a murder. He was given full *Miranda* warnings before an interrogation in which he gave two inculpatory statements. The issue in the case was "whether the statements were to be excluded as the fruit of the illegal arrest, or were admissible because the giving of the *Miranda* warnings sufficiently attenuated the taint of arrest." 422 U.S. at 591-592. This Court expressly rejected the argument that *Miranda* warnings, by themselves, may attenuate the taint of an unconstitutional arrest:

> "If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. See Davis v Mississippi, 394 US 721, 726-727, 22 L Ed 2d 676, 89 S Ct 1394 (1969). Arrests made without warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of

> words.' See Mapp v Ohio, 367 US, at 648, 6 L Ed 2d 1081, 81 S Ct 1684, 87 ALR2d 933." 422 U.S. at 602-603 (footnote omitted).

The Court's reasoning in *Brown* applies with equal force in the instant case. There is no principled reason to hold that *Miranda* warnings, by themselves, attenuate the taint of a custodial confession obtained without warnings. The failure to give warnings deprives a person of his right against compulsory self-incrimination. The Fifth Amendment violation should be treated the same as the Fourth amendment violation was in *Brown*.

The Court in *Brown* also rejected a "but for" rule. The defendant in *Brown* did not, and Elstad does not, urge the adoption of such a rule. Rather, the approach employed in *Brown* should apply in the Fifth Amendment context here:

> "* * * The question whether a confession is the product of a free will under Wong Sun must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, see Johnson v Louisiana, 406 US 356, 365, 32 L Ed 2d 152, 92 S Ct 1620 (1972), and, particularly, the purpose and flagrancy of the official misconduct are all relevant. See Wong Sun v United States, 371 US, at 491, 9 L Ed 2d 441, 83 S Ct 407. The voluntariness of the statement is a threshold requirement. Cf. 18 USC § 3501 [18 USCS § 3501]. And the burden of showing admissibility rests, of course, on the prosecution." 422 U.S. at 603 (footnotes moitted).

The state argues "[w]here an initial confession is excluded solely as a result of the failure to give *Miranda* warnings, the subsequent advisal of *Miranda* warnings and valid waiver of rights effectively remove the prior illegality. This result should follow as a matter of law." (Petitioner's Brief pp. 24-25).

This argument virtually renders meaningless the initial failure to give *Miranda* warnings to a person before custodial interrogation. Again, the state attempts to show that there was really nothing or very little that was done wrong by the police in this case. Again, it is submitted that the failure to give *Miranda* warnings was a fundamental and most serious violation of the *Miranda* rules. The state is urging the adoption of a qualified *per se* rule of attenuation as a substitute for principled analysis on an objective case by case basis. Such an analysis is required by *Brown* in the context of a confession following a Fourth Amendment violation and should be required in the Fifth Amendment context.

The state recognizes that the *Miranda* decision established an objective test and created a presumption that custodial interrogation is coercive. Statements obtained during custodial interrogation without *Miranda* warnings are presumed to be the result of coercion. They are inadmissible for that reason.

The subsequent giving of *Miranda* warnings before a second custodial interrogation cannot alone rebut the presumption that a second confession is tainted by the first illegally obtained confession. *Brown* v. *Illinois*, 422 U.S. 590 (1975). The subsequent warnings do not reestablish the fair individual-state balance that the *Miranda* decision attempted to assure, because the police have taken advantage of the person's infirmity and worsened his position by improperly eliciting a confession. In order

to re-establish the pre-interrogation individual-state balance, something in addition to the *Miranda* warning must be required to counter the unfairly induced confession.

The Oregon Court of Appeals presumed that Elstad's first confession was the result of coercion inherent in custodial interrogation. This was consistent with the *Miranda* decision. The court also presumed that the taint of the first confession carried over the the second confession unless something broke the stream of events and attenuated the second confession. The Oregon court looked to objective factors to determine whether the second confession was tainted by the first. The court's approach was wholly consistent with the fruit of the poisonous tree doctrine. The opinion states:

> "Conceding that the flagrancy of police misconduct is a factor in another 'fruit of the poisonous tree' context and that it may be a factor in the analysis of the 'total circumstances of each case' that we must make in these successive interrogation cases, *State v. Mendacino*, *supra*, 288 Or at 238, we disagree that it is a factor of sufficient significance to distinguish this case from *Hibdon*. The state's analysis denigrates the importance of *Miranda* v. *Arizona*, *supra*, in which the court held that the warnings were mandatory in order to protect Fifth Amendment rights against 'the compulsion inherent in custodial surroundings.' 384 US at 458. Regardless of the absence of actual compulsion, the coercive impact of the unconstitutionally obtained statement remains, because in a defendant's mind it has sealed his fate. It is this impact that must be dissipated in order to make a subsequent confession admissible. In determining whether it has been dissipated, lapse of time and change of place from the original surroundings are the most important considerations. *See Westover* v. *United States*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966)." 61 Or. App. at 677 (footnote omitted).

The Oregon court properly rejected the *Miranda* warnings, by themselves, as being sufficient to remove the taint of the first confession. The court then concluded there were no other relevant factors which broke the stream of events. The court properly focused on the time interval of 45-60 minutes between interrogations and the move of defendant by the police from his home to the police station. *Westover* v. *United States*, 384 U.S. 436 (1966). The court's decision is consistent with the fruit of the poisonous tree doctrine. *Brown* v. *Illinois*, 422 U.S. 590 (1975); *Wong Sun* v. *United States*, 371 U.S. 471 (1963). In addition, the failure to give *Miranda* warnings was a flagrant violation of the *Miranda* decision. *See: Brown* v. *Illinois*, 422 U.S. at 604; *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).[6]

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[6] The state argues that *United States* v. *Toral*, 536 F.2d 893 (9th Cir. 1976) is on point. That court looked to whether the conditions that rendered the pre-warning admissions inadmissible carried over to taint the defendant's second confession. On the facts of that case, the court held that the second confession was admissible.

In *Toral*, federal agents went to the defendant's home with a warrant to search it for drugs. The agents were admitted by the defendant's wife, and several persons were inside, some of whom were suspected of being involved in narcotics trafficking. An agent found a brown paper bag containing heroin in a bedroom. The agent asked defendant who the bedroom and bag belonged to. The defendant said they were his. The defendant was arrested and given *Miranda* warnings. He then admitted he had received some heroin and was holding it because of the money involved.

The *Toral* court noted that the original questions were "in the form of preliminary questions that may have been asked of anyone to narrow the field of suspects." 536 F.2d at 896. The *Toral* court reached the wrong result. While the police did not have an arrest warrant for Toral, the questioning was improper under *Miranda*. Furthermore, as in the instant case, the only relevant intervening factor was the giving of *Miranda* warnings. The second confession was presumptively tainted and should have been excluded in *Toral*. *See e.g. United States* v. *Nash*, 563 F.2d 1166 (5th Cir. 1977).

There can be no question that Elstad initially admitted he was involved in the burglary. Officer Burke told him he believed he was involved. Elstad replied, "Yes, I was there." The police believed Elstad was involved when they went to arrest him. Elstad's initial admission supported the officers' belief.

This might be a different case if the police had only failed to give Elstad part of the *Miranda* warnings. *See Michigan* v. *Tucker*, 417 U.S. 433 (1974). This case might also be different if something more than *Miranda* warnings occurred before the second interrogation. For example, the police could have told Elstad his first statement could not be used against him.[7] Elstad could have been allowed to meet with and consult a lawyer. Different considerations would be present if a defendant indicated that he knew his first statement was not admissible, even if the police did not tell him that (*i.e.* statements by a defendant that he had been given *Miranda* many times and understood what the rights meant from his prior encounters with the police).

The state speculates on a silent record that Elstad most likely did not believe that his initial confession "sealed his fate" (Petitioner's Brief p. 33). Of course, the opposite inference is just as likely. The Oregon Court of Appeals had no difficulty concluding the statement was "significantly inculpatory." 61 Or. App. at 678. The state also

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[7] This has been suggested as a dispositive attenuation factor. *See State* v. *Edwards*, 284 N.C. 76, 199 S.E.2d 459 (1973). The police should clearly understand that when someone is arrested and interrogated *Miranda* warnings are required. When a situation arises where a statement has been obtained after an arrest but before *Miranda* warnings, the police should know when they begin a second interrogation that the prior statement will be inadmissible at trial.

notes that Elstad did not testify on the motion to suppress. But that is irrelevant. The state had the burden to show that Elstad's second confession was admissible. *Brown* v. *Illinois*, 422 U.S. 590 (1975); *Harrison* v. *United States*, 392 U.S. 219 (1968).

The Oregon Court of Appeals correctly applied an objective test and concluded that the second confession was tainted by the first.

C. The decision of the Oregon Court of Appeals is consistent with *United States v. Bayer*, 331 U.S. 532 (1947).

Exclusion of Elstad's written confession is consistent with the "cat out of the bag" analysis first mentioned in *United States* v. *Bayer*, 331 U.S. 532 (1947). The state criticizes what it calls a "colorful metaphor." (Petitioner's Brief p. 14). A review of sequential confession cases since *Bayer* reveals that the expression has been widely used by both federal and state courts. The reason for this is probably that it states a truth about human psychology. The original quote is:

> "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as the fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually diables the confessor from making a usable one after those conditions have been removed." 331 U.S. at 540-541.

The Court in *Bayer* rejected the lower court's holding that the second confession sought to be excluded in that case was the fruit of the earlier inadmissible confession. The lower court relied on *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920) and *Nardone* v. *United States*, 308 U.S. 338 (1939). The *Bayer* Court held "[t]he Silverthorne and Nardone Cases, relied on by the Court of Appeals, did not deal with confessions but with evidence of a quite different category and do not control this question." 331 U.S. at 541. Those cases involved the exclusion of the fruits of evidence illegally seized under the Fourth Amendment.

The *Bayer* Court did not specifically reject the fruit of the poisonous tree doctrine in the Fifth Amendment context. It only held that a person is not perpetually unable to make an admissible confession after making an involuntary confession. Moreover, the Court looked to objective factors in deciding that the second confession was admissible. The Court noted that the second confession was made six months after the first and the only restriction on the defendant when he confessed the second time was that he could not leave the military base to which he was assigned without permission.

The Oregon Court of Appeals looked to similar factors in holding that Elstad's second confession was inadmissible. In doing so, that court was consistent with the fruit of the poisonous tree doctrine as developed by this Court. *See Brown* v. *Illinois*, 422 U.S. 590 (1975); *Harrison* v. *United States*, 392 U.S. 219 (1968); *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

III.

Exclusion of Elstad's Written Confession is Consistent With the Rationales for the Exclusionary Rule.

A number of rationales have been used to justify the exclusionary rule in both Fourth Amendment and Fifth Amendment contexts. In *Weeks* v. *United States*, 232 U.S. 383 (1914), the Court ruled that evidence seized in

violation of the Fourth Amendment could not be introduced in a criminal trial. The Fourth Amendment is self-executing and if the government can use illegally seized evidence to convict a person the Fourth Amendment "might as well be stricken from the Constitution." 232 U.S. at 393. Moreover, to allow the uses of such evidence would place the courts in the position of implicitly condoning the illegal police conduct. The Court stated:

> ". . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." 232 U.S. at 394.

In *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385 (1920), the Court held that copies of illegally seized business records could not be used as the basis of a criminal prosecution in a contempt action to require the production of the originals. The use of such evidence would reduce the Fourth Amendment to "a form of words." 251 U.S. at 392. The Court stated:

> ". . . The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." 251 U.S. at 392.

Silverthorne Lumber Company marked the Court's acknowledgment of the fruit of the poisonous tree doctrine. That doctrine has, of course, been applied to the Fourth Amendment by this Court on numerous occasions. *See: Nardone* v. *United States*, 308 U.S. 338 (1939); *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Brown* v. *Illinois*, 422 U.S. 590 (1975); *But see: United States* v. *Ceccolini*, 435 U.S. 268 (1978). And the doctrine applies as well to Fifth Amendment violations. *Michigan* v. *Tucker*, 417 U.S. 433 (1974); *Harrison* v. *United States*,

392 U.S. 219 (1968). The state acknowledges this fact and does not argue that it should be changed. (Petitioner's Brief p. 25).

The early rationales for the exclusionary rule focused on the protection of individual rights and a belief that courts should not be involved in the use of illegally seized evidence. Later discussions of the exclusionary rule have tended to focus on protecting the courts from the use of unreliable evidence and deterring police from violating constitutional protections in the future. *See e.g. Michigan* v. *Tucker*, 417 U.S. at 446-450; *Brown* v. *Illinois*, 422 U.S. at 499-600; *Escobedo* v. *Illinois*, 378 U.S. 478, 488-489 (1964); *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).

In concluding that the challenged evidence in *Michigan* v. *Tucker*, *supra*, should not have been excluded from the trial, the Court concluded that excluding the witness' testimony would not specifically augment whatever deterrent effect exclusion of Tucker's own statements had already accomplished. 417 U.S. at 447-448. Another significant consideration was that there was no reason to believe the witness' testimony was untrustworthy because Tucker had not been advised of his right to appointed counsel.

The *Tucker* Court also found it was significant that the partial *Miranda* violation occurred before the *Miranda* decision. The officers in that case informed Tucker of his constitutional rights *before* they were required to by the *Miranda* decision. In discussing the deterrence rationale in *Tucker*, the Court said:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refus-

> ing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." 417 U.S. at 447.

In contrast to *Tucker*, Elstad's right against compulsory self-incrimination was violated. And it cannot be said that the police failed to give him *Miranda* warnings in complete good faith. They flagrantly violated *Miranda*.

Exclusion of Elstad's written confession serves the deterrence rationale very well. All police officers understand that when they arrest a person with a warrant they must give the person *Miranda* warnings before interrogation. The giving of the warnings and adherence to the principles of the *Miranda* decision will be greatly encouraged if police know that both a custodial confession obtained without warnings and a subsequent nonattenuated confession will be excluded. *Miranda* simply encourages warnings before interrogation. Exclusion of tainted confessions in this context will deter police from ignoring the warnings.[8]

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[8] The Solicitor General argues that the deterrence rationale for the exclusionary rule does not apply "to deter police from questioning suspects in custody without warnings, but rather to deter abusive police practices." (Brief for the United States pp. 22-23). This argument demonstrates one of the problems in discussing deterrence. Deterrence implies something negative—the stopping of certain practices. The concept can better be viewed positively. Application of the exclusionary rule in appropriate cases encourages adherence to constitutional protections in instances in which constitutional rights are to be protected. In the instant case, application of the exclusionary rule to the written confession encourages the police to follow *Miranda* in cases in which they are seeking admissions from someone they have already decided committed the crime they are investigating. Such a case is one in which the *Miranda* decision is most applicable.

In addition, exclusion of the written confession in this case will discourage police from questioning an arrestee without *Miranda* just to the point of obtaining an incriminating statement, then breaking off the interrogation in hope that the arrestee will feel he has nothing to lose by confessing again, in more detail, after the giving of *Miranda* warnings. The state's suggested qualified *per se* rule that *Miranda* warnings attenuate a second confession as a matter of law actually encourages this approach by the police (Petitioner's Brief pp. 24-25). An officer who knows later *Miranda* warnings will remove the taint of a custodial statement obtained without warnings may feel that he has little to lose by going ahead and questioning an arrestee without advising him of his constitutional rights.[9]

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[9] The idea that police would attempt to obtain custodial statements without giving *Miranda* warnings if they knew a second confession would be attenuated by the giving of warnings is not farfetched. Studies indicate law enforcement officials have tended to "push to the limit" any constitutional restraint on their actions. For example, despite having to give *Miranda* warnings, police are able through a variety of techniques to induce the overwhelming majority of suspects to waive the right to counsel. *See* White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581, 598 (1979); Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 Den. L. J. 1, 26-34 (1979); *Oregon State Police Manual* 101-103 (1979); Stephens, Flanders & Cannon, *Law Enforcement and the Supreme Court: Police Perceptions of the Miranda Requirements*, 39 Tenn. L. Rev. 407 (1972); Medalie, Zeitz and Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347, 1394-95 (1968); Inbau & Reid, *Criminal Interrogation and Confessions*, 31, 106 (2d ed. 1967); Project, *Interrogation in New Haven: The Impact of Miranda*, 76

Exclusion of Elstad's written confession serves all rationales for the exclusionary rule. Exclusion is consistent with the *Miranda* decision, where the Court held that in the absence of warnings and a valid waiver "no evidence obtained as a result of interrogation can be used against" a person. 384 U.S. at 479.

CONCLUSION

For the above reasons, the judgment of the Oregon Court of Appeals should be affirmed.

Respectfully submitted,

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Yale L.J. 1519, 1614 (1967); Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. Pitt. L. Rev. 1 (1967); Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L. Rev. 59, 94-104 (1966); Lynch, *Interrogation of Criminal Defendants—Some Views on Miranda* v. *Arizona*, 35 Fordham L. Rev. 221 (1966); Younger, *Interrogation of Criminal Defendants—Some Views on Miranda* v. *Arizona*, 35 Fordham L. Rev. 255 (1966); Aubrey and Caputo, *Criminal Interrogation* (1st ed. 1965).